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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

WILLMUT GAS AND OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION,

UNITED GAS PIPE LINE COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Willmut Gas and Oil Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-styled cause on July 20, 1961.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, is set forth in Appendix A hereto. The order of the Federal Power Commission (R. 52) affirmed by the Court of Appeals is also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1961. The jurisdiction of the Court of Appeals was based on Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). The jurisdiction of this Court is based on Section 1254(1) of the Judicial Code, 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

During the pendency of proceedings before the Federal Power Commission under Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), to determine the lawfulness of rate increases filed by a natural gas company under Section 4(d) of the Act, the company tendered superseding increases for filing under Section 4(d). Petitioner, a customer of the company, petitioned the Commission to reject the superseding increases, or, in the alternative, to issue an order accepting them for filing and disallowing the superseded increases by dismissing the proceedings thereon and ordering refund of monies collected under them. The Commission denied the petition by issuing an order accepting the superseding increases for filing, permitting some to take effect, suspending others and convening a proceeding on the lawfulness of all of them.

Two questions are presented:

1. Can the Federal Power Commission, whose authority under Section 4(e) of the Natural Gas Act is

confined to the issuance of orders fixing rates for sales of natural gas to be thereafter observed and which has instituted proceedings under Section 4(e) on particular rates filed by the natural gas company under Section 4(d), permit those rates to be superseded by higher rates filed under Section 4(d) while those proceedings are pending and before it has issued such orders?

2. If the Federal Power Commission permits rates to be filed and made effective under Sections 4(d) and 4(e) of the Natural Gas Act, which rates increase and supersede prior increased rates filed under Section 4(d) and under investigation in proceedings instituted under Section 4(e), has it deprived itself of jurisdiction to continue said investigation and issue orders determining the lawfulness of the rates at issue therein?

RELEVANT STATUTES AND RULES

The relevant sections of the Natural Gas Act and the Commission's Regulations thereunder are set forth in Appendix C hereto.

STATEMENT OF THE CASE

United Gas Pipe Line Company is a natural gas company as that term is defined in Section 2(6) of the Natural Gas Act. It is engaged in the sale of natural gas in interstate commerce for resale at rates filed with the Federal Power Commission pursuant to Section 4 of the Act, among which rates are those described in its tariffs as its IND-J, DG-J and G-J Rate Schedules, all applicable in its Jackson Rate Zone. Willmut Gas and Oil Company sells and distributes natural gas in Hattiesburg, Mississippi and its environs. It pur-

chases its entire supply of gas from United under its Rate Schedule IND-J (applicable to gas resold for large volume industrial use only), and its Rate Schedules DG-J and G-J (applicable to gas resold for general use, primarily by domestic and commercial consumers).

As of February 11, 1960, there were (and still are) pending and undecided before the Commission five separate proceedings convened under Section 4(e) of the Act to determine the lawfulness of five separate changes in United's IND-J, DG-J and G-J rates filed with the Commission under Section 4(d) of the Act. Each filing contains rates superseding and increasing the rates contained in the next preceding filing, and each of the last four filings was made while the proceedings to determine the lawfulness of the rates in the preceding filings were pending. These proceedings bear the Commission's Docket Nos. G-9547 (filing of September 30, 1955), G-10592 (filing of May 15, 1956), G-12801 (filing of May 29, 1957), G-15360 (filing of May 29, 1958) and G-18406 (filing of March 30, 1959).

On February 11, 1960 United tendered to the Commission for filing its sixth superseding increases in its Rate Schedules IND-J, DG-J and G-J, which it proposed to make effective on March 13, 1960. This filing is the subject of the Commission's Docket No. RP60-2. On February 23, 1960 Willmut filed a petition asking the Commission to reject said sixth increases, or alternatively, to issue an order accepting them for filing and disallowing the rate increases at issue in Docket Nos. G-9547, G-10592, G-12801, G-15360 and G-18406. On March 1, 1960 United filed an Answer to Willmut's Petition praying that it "be in all things denied". On

March 10, 1960, the Commission issued an order (1) reciting, *inter alia*, the filing of Willmut's Petition and United's Answer thereto and that the rates contained in said Schedules may be unlawful, (2) accepting said Schedules for filing, (3) permitting said IND-J Schedule to take effect on March 13, 1960, (4) suspending said DG-J and G-J Schedules until August 13, 1960, and (5) ordering a public hearing on said Schedules at a date to be subsequently fixed. The DG-J and G-J Schedules went into effect on August 13, 1960 pursuant to a motion filed by United under Section 4(e) of the Act.[1]

Willmut petitioned for and was denied rehearing of the Commission's order of March 10, 1960, after which it sought and obtained review of the Commission's action in the Court of Appeals for the District of Columbia Circuit. On July 20, 1961, that Court issued its opinion by Chief Judge Miller, Associate Judges Fahy and Burger concurring, affirming the order of the Commission.

REASONS WHY THE WRIT SHOULD ISSUE

The Conflict Between Circuits

This petition presents important questions of federal law which have not been decided by this Court. Until this Court does decide them the scope of the authority and correlative duty of the Federal Power Commission to control natural gas rates, which control and the consequent protection of consumers were the whole reason for the enactment of the Natural Gas

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[1] The sixth increases were themselves superseded by subsequent increases filed by United on January 18, 1961. The IND-J Schedules of these seventh increases went into effect on February 18, 1961. The DG-J and G-J rates went into effect on June 15, 1961.

Act, will remain confused and obscure. Indeed, the Commission's holding affirmed by the Court below in this case is in effect an abdication of its regulatory authority under the Act, the result of which is to permit Section 4 thereof to be used as a vehicle for piling increase upon increase with such frequency and regularity as to foreclose the Commission from discharging its duty to fix just, reasonable and otherwise lawful rates.

Moreover, unless this Court decides the questions presented now there will be left standing two conflicting decisions by two Courts of Appeals rendered within four days of one another. One is the decision which this petition asks this Court to review. The other is the decision of the United States Court of Appeals for the Tenth Circuit in *Amerada Petroleum Corp.* v. *F.P.C.* (Nos. 6483, 6498, decided July 24, 1961). The latter decision, not yet reported, is set forth in Appendix B hereto. A comparision of the two cases discloses a sharp conflict between the two Courts on two vital matters: First, the proper interpretation of this Court's holding in *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 76 S. Ct. 373, and *United Gas Pipe Line Co.* v. *Memphis L.G. & W. Div.*, 358 U.S. 103, 79 S. Ct. 194; second, the nature and reach of the Commission's authority under Section 16 of the Natural Gas Act.

In both the *Amerada* Case and the instant case the issue was the power of the Commission to reject for filing under Section 4(d) of the Natural Gas Act increases in gas rates superseding previously filed increases whose lawfulness was in issue in pending proceedings instituted under Section 4(e). The only relevant difference in the facts in the two cases is that

in *Amerada* the superseding increases were tendered for filing while the prior increases were under suspension, whereas in the instant case the superseding increases were filed after the period of suspension had expired. However, neither Court treated suspension *vel non* as material.

In *Amerada* the Court held that the Commission had authority to reject and that it properly rejected for filing increases which would have superseded prior increases under investigation. In so doing *Amerada* correctly read *Mobile*. As this Court explained in *Memphis, Mobile* does no more than tell us one circumstance in which a natural gas company may not file an increase in rates under Section 4(d) of the Act, i.e., when it has contracted away its right to do so. It does not tell us the circumstances in which a natural gas company who has not contracted away its right to file an increase in rates may do so. The Court below incorrectly read *Mobile* as holding that the Commission is without power to "restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirements of Section 4(d) of the Act that it notify the Commission of the changes. . . ." In so doing it ignored the very holding in *Memphis* on which *Amerada* relied, namely, that even though a natural gas company be contractually free to file increases, its right to do so is "subject of course to the procedures and limitations of the Natural Gas Act." 358 U.S. at page 110.

Both the Court in *Amerada,* and the Commission in its brief there relied on Section 16 of the Natural Gas Act, by which, to quote the Court:

> ". . . the Commission is expressly vested with power 'to perform any and all acts, and to pre-

> scribe, issue, make, amend, and rescind such orders . . . as it may find necessary or appropriate to carry out the provisions of this Act.' *Manifestly, that is a sweeping grant of administrative authority to be exercised in the sound discretion of the Commission. . . .*" (App. B, p. 14a; emphasis supplied)

The Commission's brief in *Amerada*, quoting *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, 571, noted that its authority under Section 16 ". . . extends to regulation of the procedure 'under which increased rate schedules are to be filed'." (FPC Brief, p. 6). And it pointed out that Section 16 gave it "power to adopt reasonable procedures promulgated in the light of a statute which did not contemplate the type of successive increases exemplified in this case." (FPC Brief, p. 6).

In contrast the Court below held that "the broad power granted by [Section 16] does not authorize an order, rule or regulation" governing the circumstances under which rate increases may be filed under Section 4(d). It was of the view that "if 'piling increase upon increase' is to be forbidden, legislation to that effect must be adopted." (App. A, p. 9a).

The Nature of the Commission's Basic Authority

The Congress may delegate to administrative agencies either legislative or judicial authority or both. Thus the Interstate Commerce Commission exercises both in the regulation of the rates of railroads. *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 350, 52 S. Ct. 183 (1932). That case emphasizes both the difference between the two types of authority, and the inadequacy of judicial authority to afford pro-

tection against exhorbitant rates. As this Court there said, if the Commission can exercise only judicial authority the carrier is free, notwithstanding a finding that a rate is unreasonable, to "put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable". 52 S. Ct. at p. 184.

As a consequence the Congress vested in the Federal Power Commission legislative authority, i.e., the authority to prescribe rates for the future, and when it declares a specific rate to be the lawful rate "it speaks as the Legislature, and its pronouncement has the force of a statute". 52 S. Ct. at p. 184. This legislative authority is the only rate regulatory authority the Commission has. As Mr. Justice Frankfurter said in his dissenting opinion in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 263, "the statute is based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief". Hence the Federal Power Commission has no judicial power to award reparations. To quote *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 805 (C. A. 4th 1952):

> "The Commission is given no power to enter reparation orders with respect to rates. Its power over rates, which is prescribed by section 5(a), 15 U.S.C.A. § 717d(a), is to determine after a hearing whether existing rates are unjust, unreasonable, discriminatory or preferential, and, if so, to prescribe the just and reasonable rates 'to be thereafter observed and in force'. If it suspends a proposed new rate under section 4(e), and enters upon a hearing pursuant to that section, it can

> make only such orders with respect thereto 'as would be proper in a proceeding initiated after it had become effective', i.e. a proceeding under section 5(a). As said by the Supreme Court in Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 591, 618, 64 S. Ct. 281, 295, 88 L.Ed. 333. 'It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' "

Furthermore, the Commission may not even determine the lawfulness of rates applicable in a past period. "If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions." *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287, 310 (C. A. 4th 1943), rev'd. on other grounds, 320 U.S. 591, 64 S. Ct. 281 (1944). See also *Montana-Dakota Util. Co.* v. *Northwestern Pub. S. Co., supra.* There this Court held that the Commission could not make findings as to the reasonableness of rates under Section 206(a) of the Federal Power Act, saying that:

> ". . . we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent."

The *Montana-Dakota* Case and its specific holding were re-examined, approved and applied to limit the authority of the Interstate Commerce Commission over the rates of motor carriers to the exercise of legislative power to fix rates for the future in 1959. *T.I.M.E.* v. *U.S.A.*, 359 U.S. 464, 79 S. Ct. 904. The provisions of the Federal Power Act relevant to the Commission's rate regulatory authority "are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act." *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353, 76 S. Ct. 368, 371 (1956).

Whether the Commission proceeds to discharge its rate regulatory function under Section 4(e) or under Section 5(a) of the Act, it is exercising the same authority, namely the authority to determine whether existing rates are lawful, and, if not, to prescribe others for the future. *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 341, 76 S. Ct. 373, 379. As the Court there held:

> "The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential'. This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a

> newly changed rate or contract (except 'industrial' rates), the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful." (Emphasis the Court's).

And the existence of the suspension power "in no way affects the character of the proceeding [under Section 4(e)], which remains, like a § 5(a) proceeding, simply a review by the Commission of a rate established by the natural gas company." *Mobile* so held. 350 U.S. at p. 343, 76 S. Ct. at p. 380. Indeed this is plain from Section 4(e) itself, which gives the Commission authority to enter upon a hearing concerning the lawfulness of newly-filed rates even though it cannot suspend industrial rates and may not choose to suspend other rates.

The Need to Preserve the Commission's Basic Authority

The foregoing demonstrates beyond doubt that when rates have ceased to be existing rates, when they have become past rates, the Commission has no authority to determine their lawfulness, either in a proceeding under Section 5(a) or in a proceeding under Section 4(e). It follows that only by the Commission's exercise of its authority to review existing rates and fix lawful rates for the future can obedience to the commands of Section 4(a) and (b) that all rates be just, reasonable and non-discriminatory, be compelled. Hence the preservation and protection of the Commission's ability to exercise this authority is indispensable. The ques-

tion here is whether the Commission may, by action or inaction, effectively foreclose itself from exercising that authority. That it has done just this here is patent.

On November 2, 1954 the Commission, in consolidated proceedings under Sections 4(e) and 5(a) of the Act on all of the rates of United, issued an order prescribing rates to be charged Willmut and virtually all of its other customers to whom it sells gas for re-sale "on and after August 1, 1954". Notwithstanding the Order of November 2, 1954 United effected periodic increases, each one superseding the one before, in virtually all of those rates, including those charged Willmut, by filings under Section 4(d) of the Act in September of 1955, May of 1956, May of 1957, May of 1958, March of 1959, February of 1960, and January of 1961. As each filing was made the Commission issued an order reciting the reasons stated by United in support of the increases, finding that the rates "may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful," and providing for a hearing pursuant to Section 4(e), and in some cases pursuant to Section 5(a) as well. For example the order instituting an investigation in Docket G-9547, invokes both Section 4(e) and Section 5(a). Hearings on the increases filed in September of 1955 and May of 1956 were concluded on October 31, 1956 and April 8, 1957, respectively, but no determination of the lawfulness of the rates in issue in those cases has yet been made. Hearings on the other increases have just begun. The result is that for the past six full years Willmut and virtually all of United's other resale customers have been paying rates which are not only higher than those the Commission found lawful

in November of 1954 and directed to be "thereafter observed and in force," but also which the Commission found may be unlawful.

All of United's rates in issue except those made effective by the filing of January 18, 1961 are past rates. Hence, with this matter in its present posture the Commission cannot exercise the only authority respecting them it had, i.e., to review them while they were existing and, if it determined them to be unlawful, to prescribe others for the future in their stead. The result is that unless the Commission is required to take appropriate action there is no way to determine whether United obeyed the commands of Section 4(a) and 4(b) of the Act that it charge just, reasonable and nondiscriminatory rates during the period from September of 1955 to January 1961, much less to compel obedience to, or grant Willmut and its other customers a remedy for its disobedience of, those commands.

The Commission's Power to Preserve Its Basic Authority

The Commission with the approval of the Court below, says that it is helpless in the premises. We submit that it is not. As we've seen, this conclusion is founded on the view that *Mobile* and *Memphis* interpret Section 4(d) of the Act to give a natural gas company an absolute right to file changes in rates unless it has contracted with its customers not to. This is untenable. Section 4(d) in relevant part reads as follows:

> "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be

> given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. . . ."

The foregoing language governs only *how* rate changes may be made. It does not govern whether or when they may be made, or even what kind of changes may be made. Indeed, this is the import of *Mobile* and *Memphis*. As this Court said in Memphis, "Mobile makes it plain that '§ 4(d) on its face indicates no more than that *otherwise valid* changes cannot be put into effect without giving the required notice to the Commission.' " 358 U.S. at p. 112, 79 S. Ct. at p. 199. (Emphasis the Court's in *Memphis*).

The validity of the changes in both *Mobile* and *Memphis* turned on the nature of the relationship and the terms and conditions of United's contracts with its customers. In *Mobile* the Court held that a natural gas company's rate changing powers *vis a vis its customers* were unaffected by the Act and that United had contracted away its right to effect a change in its rate to Mobile. In *Memphis* it held that United had not contracted away its right to effect a change in its rate, and that on the record before it in that case United had complied with "the duties which these sections [4(c) and 4(d)] in terms impose upon it." 358 U.S. at p. 111, 79 S. Ct. at p. 199. In neither case did the Court hold that compliance with a contract and with the terms of Section 4(d) were the *sole criteria* for determining the validity of a rate change. On the contrary, the Court said in *Memphis* that United was contractually "free to change its rates from time to time, *subject, of course, to the procedures and limitations of the Natural Gas*

Act." 358 U.S. at p. 110, 79 S. Ct. at p. 198. (Emphasis supplied.)

Both the Commission and the Courts have made clear that compliance with Section 4(d) alone does not make a rate change valid. Under Section 16 of the Act the Commission has broad authority to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or *appropriate to carry out* the provisions of this act. . . ." (Emphasis supplied.) Under this Section the Commission has promulgated its Regulations Under the Natural Gas Act. Among other things Section 154.22 forbids the filing of a rate change more than 60 days before it is to take effect. Section 154.38(d)(1) requires rates in contracts to be stated in dollars and cents per unit. Section 154.38(d)(3) forbids contracts to provide for rate adjustments. Section 154.40 requires contracts to spell out the rights and obligations of the parties with respect to specific matters. Section 154.63 requires the filing of elaborate and specifically described materials with and in addition to filings of rate changes. Section 154.24 gives the Commission the right to reject any filing which does not comply with the foregoing rules. Section 154.66(a) forbids the withdrawal of a suspended rate change without special permission upon application and for good cause shown. Sections 154.66(b) and (c) likewise forbid changes in suspended rates changes, and changes in existing rates during the period of suspension of changes therein.[2]

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[2] Section 154.66 was promulgated by Order No. 159 issued March 6, 1951. In that Order the Commission said:

"As for the objections which argue lack of authority in the Commission and the right of natural gas companies to file changes without restriction during the period of suspension, it seems

An order of the Commission summarily disallowing a rate change filed 75 days after its decision on a prior change was held proper. *Panhandle Eastern Pipe L. Co.* v. *Federal Power Com'n.*, 236 F. 2d 606 (C. A. 3rd 1956). So too was an order disallowing a rate increase insofar as it was based on the same matters which the Commission had held insufficient in a proceeding on another rate increase by the same natural gas company. *State Corp. Com'n. of Kan.* v. *Federal Power Com'n.*, 206 F. 2d 690 (C. A. 8th 1953). And *Mobile* holds that there "can be no doubt of the authority of the Commission to reject [an] unauthorized filing under its general powers to issue orders 'necessary or appropriate to carry out the provisions of this Act', § 16", and that its failure to do so is reversible error. 350 U.S. at p. 347, 76 S. Ct. at p. 382.

Further strong support for the Commission's power to control rate filings under Section 4(d) of the Act is found in the Interstate Commerce Act and decisions thereunder. "Section 5 of the [Natural Gas] Act was modeled on the provisions of the Transportation Act, 49 U.S.C. §§ 13, 15. . . ." *Federal Power Commission*

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sufficient to point out that the provisions of the new § 154.66 effectuate the primary purpose for suspension of changes in rate schedules or tariffs, namely, the maintenance of the *status quo until due inquiry has disclosed the propriety or lack thereof, of the proposed change.* Unrestrained filing of changes upon changes would preclude orderly determination of issues and would be productive of uncertainty regarding the effective rates and charges, nullifying the definiteness and certainty which filing requirements are intended to afford consumers and other interested parties. The exercise of the authority contemplated by the new § 154.66 is a necessary incident to the authority vested in the Commission by § 4 of the Natural Gas Act, and additionally finds ample support in § 16, which provides that the 'Commission shall have power • • • to prescribe • • • such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of the Act.'" (Emphasis supplied).

v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584, 62 S. Ct. 736, 742. Indeed, except for the former's preservation of the right of natural gas companies to contract with their customers, the scheme for the exercise of legislative authority to review existing rates and fix future rates, the only power the Federal Power Commission has, is the same. See *Hope, supra,* 196 F. 2d at p. 806-807. Thus Section 15(1) of the Interstate Commerce Act, like Section 5(a) of the Natural Gas Act gives the Commission authority to review existing rates, and if it finds them unlawful "to determine and prescribe what will be the just and reasonable . . . rates . . . to be thereafter observed. . . ." Section 6(1), like Section 4(c) requires all rates to be filed with the Commission and kept open for public inspection. Section 6(3), like Section 4(d), provides that: "No change shall be made [in rates] except after thirty days' notice to the Commission and the public." Section 15(7) provides for the suspension for a limited time and investigation of rates filed pursuant to Section 6(3) just as Section 4(e) provides for the suspension for a limited time and investigation of rates filed pursuant to Section 4(d).

> "The settled construction by the Interstate Commerce Commission of the suspension provision of the Interstate Commerce Act is that, when the Commission suspends a rate, the old rate is continued in effect *pending the investigation* and subsequent orders allowing increased rates are given only prospective operation." *Hope, supra,* 196 F. 2d at p. 807. (Emphasis supplied.)

> "When the [Interstate Commerce] Commission suspends the operation of a tariff it is contemplated that the rates sought to be increased or otherwise changed are to be continued in effect pending the investigation. *In other words it is*

> *expected that the status quo will be maintained until the proposed change therein can be fully investigated. . . .*" *Class Rates Between Stations In Louisiana*, 33 I.C.C. 302, 303 (1915). (Emphasis supplied).
>
> "The rule applies, therefore, that where provisions of one statute have been adopted by another, the interpretation which has been authoritatively placed upon the former applies to the latter also." *Hope, supra*, 196 F. 2d at p. 807.

That the Commission has the same authority as the Interstate Commerce Commission to prevent increased rate filings before the lawfulness of prior filings is determined is further evidenced by the dissent of Mr. Justice Douglas in *Memphis*, in which the Chief Justice and Mr. Justice Black concurred. In support of their view that the "construction adopted by the court [in *Memphis*] has dire consequences" they said: "Even when the Commission catches up with the new high rate fixed by the selling company at its will and strikes it down, its action promises to have only a fleeting effect. The pipeline company can now in its unfettered discretion raise the rates again simply by filing a new rate; and if it is an industrial rate it cannot even be suspended." In a footnote to this the State of Washington is quoted to the effect that "any relief obtained by a Commission order after review could be effectively nullified 30 days after it was obtained." How much more dire the consequences if, as the Court below holds, the Commission can allow a natural gas company to file a second, third, fourth, fifth, sixth and seventh increase before a determination of the lawfulness of the first is made?

In this connection it is of course true that, as the majority in *Memphis* said, business reality requires that

natural gas companies have adequate revenues. But the majority obviously did not mean that this requires that they be allowed to file rate increases at will, each to take effect not more than 30 days after filing in the case of industrial rates and not more than 6 months after filing in the case of other rates. As the late Mr. Justice Parker said in *Hope, supra,* 196 F. 2d at p. 809:

> "Rate making is not an exact science and losses of one period must be counterbalanced against gains of another in any fair consideration of the reasonableness of the rate making procedure.
>
> "[5] It is true, of course, that a utility is entitled to rates that are just and reasonable; but this is not to say that rates must fluctuate automatically with every change in economic conditions or that a reasonable time may not be allowed for determining the reasonableness of a proposed increase in rates before it is allowed to go into effect. Any loss sustained by a maintenance of the status quo while such determination is being made is properly considered, not as a violation of constitutional right, but as a necessary incident of rate regulation so long as the period of suspension does not 'overpass the bounds of reason.' . . ."

As Mr. Justice Harlan said on this matter of economics in *Memphis,* the Congress provided in Section 4 of the Natural Gas Act "for the earliest effectuation of contractually authorized or otherwise permissible rate changes *consistent with appropriate Commission review.*" 358 U.S. at p. 114, 79 S. Ct. at p. 200. (Emphasis supplied.)

It cannot be gainsaid that to permit the filing under Section 4(d) of a rate increase which supersedes one previously filed but under investigation as to its lawfulness is not "consistent with appropriate Commis-

sion review" when, as we have seen, to do so is to render the superseded rates past rates and deprive the Commission of any power whatever to review them. Assuming *arguendo* this were not true, to permit the superseding increase to take effect is to nullify in advance the order to be issued in the proceeding on the superseded rates, because that order cannot be effective as fixing rates "thereafter to be observed and in force". Thus even if that order should condemn the superseded rates the natural gas company will go on collecting rates, not merely as high as, but higher than the condemned rates. The Commission has put United's right to an increase under the criteria of Section 5(a) into issue by convening hearings under Section 4(e) on the first increase filed under Section 4(d). It cannot permit United to keep that issue pending by periodic superseding filings, the effect of which is to give it a permanent hedge against failing to prove its right to an increase, and to force its customers and the ultimate consumers to buy gas at rates the lawfulness of which has not and cannot be determined.

What the Commission Can Do

The Court below was of the view that the Commission had jurisdiction to determine the lawfulness of superseded and thus past rates because otherwise

> "a natural gas company whose newly-increased rates were being investigated by the Commission could render them immune from further scrutiny by the simple expedient of filing another increase. . . ." (App. A p. 6a).

This of course begs the question. Whether the "simple expedient" is available to a natural gas com-

pany is the basic issue. We submit that it is not because the Commission has ample authority to reject "another increase." This is just the authority it finally exercised in the *Amerada* Case.

Alternatively, the Commission can accept the superseding increases and dismiss the proceedings on the earlier ones with directions to refund amounts collected thereunder. The Court of Appeals described this alternative as "an incongruous procedure" because the Commission would necessarily be exercising jurisdiction over past rates by disallowing them and ordering refunds. (App. A, p. 6a). We submit that there is no incongruity. Indeed the Commission first chose this alternative in the *Amerada* Case when it ordered the proceedings on the superseded filings dismissed in lieu of rejecting the superseding filings. (App. B, p. 12a). The limitation on the Commission's basic rate regulatory power in Section 5(a) forbids it to determine or fix rates for the past. It does not forbid it to terminate and dispose of proceedings on rates whose lawfulness it has lost jurisdiction to determine.

Nor does Section 4(e) make a finding of unlawfulness a condition precedent to an order requiring refund. Thus in *Episcopal Theological Seminary* v. *F.P.C.*, 269 F. 2d 228, the Commission terminated a proceeding under Section 4(e) by disallowing a rate increase for failure of its proponent to carry its burden of proof that it was lawful. Although it made no finding that any rate was lawful there, it ordered the refund of the amounts collected under the disallowed increase. It had statutory authority to do the same thing here, and all of its orders permitting the rates in issue here to take effect specifically provide, as the order of June 20, 1958 in Docket No. G-12801

puts it, that the collection of the increases is "subject to further order or orders of the Commission in this proceeding, upon acceptance by the Commission . . . of [a] corporate bond, agreement, or other assurance of refund . . .".

Unless the Commission were to adopt the first alternative, i.e., reject United's superseding increases, United would be in the same position with respect to the superseded increases as were the producers in the *Episcopal* Case. It, as were they, would be unable to carry the burden of proof that the rates are lawful. They could not carry their burden because they failed to introduce sufficient evidence. United could not carry its burden because, by its subsequent filing, it deprived the Commission of jurisdiction to determine whether its evidence is sufficient or not. Therefore, as in *Episcopal,* the only appropriate order would be one dismissing the proceedings and ordering refund.

CONCLUSION

For the reasons set forth in this Petition, Willmut Gas and Oil Company prays that a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit and that upon review of the record in that Court its judgment be reversed and the cause remanded to it with directions to remand it to the Federal Power Commission with directions to either reject the tendered rate increases for filing, or, in the alternative, to accept the tendered rate increases for filing, permit them to become effective, dismiss the pend-

ing proceedings on the rates said increases superseded, and direct refund of amounts collected thereunder.

Respectfully submitted,

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October 18, 1961

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,775

WILLMUT GAS & OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

UNITED GAS PIPE LINE COMPANY, INTERVENOR

Petition for Review of Order of the
Federal Power Commission

Decided July 20, 1961

Mr. Bryce Rea, Jr., with whom *Mr. Thomas M. Knebel* was on the brief, for petitioner.

Mr. Milton J. Grossman, Attorney, Federal Power Commission, with whom *Messrs. John C. Mason*, General Counsel, Federal Power Commission, and *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, were on the brief, for respondent.

Mr. Thomas Fletcher, with whom *Mr. C. Huffman Lewis* was on the brief, for intervenor.

Before WILBUR K. MILLER, *Chief Judge*, and FAHY and BURGER, *Circuit Judges.*

WILBUR K. MILLER, *Chief Judge:* At rates it established *ex parte*, and filed with the Federal Power Commission, United Gas Pipe Line Company, a wholesaler, has for some years sold to Willmut Gas and Oil Company, a local dis-

tributor in Hattiesburg, Mississippi, all the natural gas required by the latter for resale. It does not appear that United has contracted with Willmut not to change the rates applicable to its purchases.

On September 30, 1955, United increased its tariffs under which Willmut was buying gas and, as required by Section 4(d) of the Natural Gas Act,[1] notified the Commission of the changes made. Acting under Section 4(e) of the Act,[2]

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[1] Section 4(d) of the Act, 52 STAT. 822 (1938), 15 U.S.C. § 717c(d), is as follows:

> "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

[2] Section 4(e) of the Act, 52 STAT. 822 (1938), 15 U.S.C. § 717c(e), is in pertinent part as follows:

> "Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearing, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made

the Commission suspended for five months the effectiveness of the increases[3] and ordered a hearing as to whether they were lawful. The hearing had not been completed at the end of the five-month period, so the increase was made effective, subject to a refunding bond.

On May 15, 1956, United filed a second rate increase which the Commission suspended and set for hearing. The trial examiner on April 5, 1960, issued a decision as to the filings of September 30, 1955, and May 15, 1956, which the Commission adopted, with modification, on January 4, 1961.[4]

After the two filings above referred to, United filed four additional increases: on May 29, 1957, May 29, 1958, March 30, 1959, and February 11, 1960.[5] Each was suspended and set for hearing, and presumably each became effective five months after suspension, subject to undertaking for refunds. Before a hearing on the February 11, 1960, filing had been ordered, Willmut moved the Commission to reject it in order "to prevent the destruction of its jurisdiction to entertain" the pending proceedings involving earlier increases. Willmut also moved that, if the Commission accepted for filing the February 11, 1960, schedules, it deny the increases contained in the preceding filings then under

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at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission . . . and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. . . ."

[3] Except industrial rates, which are not subject to suspension.

[4] The delay was caused by intervening litigation which culminated with the decision of the Supreme Court in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

[5] A still later increase, made December 15, 1960, is not involved here. That of February 11, 1960, will be referred to hereinafter as the latest.

investigation, and order United to refund all sums collected thereunder.

The order suspending and directing a hearing on the lawfulness of the latest increased rates was issued March 10, 1960. In a footnote to this order, the Commission noted that Willmut "has filed a petition to reject the instant proposed filing, or, in the alternative, to disallow pending undecided rate review proceedings," and noted further that United had filed an answer thereto. But the Commission did not expressly rule on Willmut's motions; inferentially it denied them by accepting United's latest filing and failing to disallow and order refunded the previous increases involved in the undecided cases.

Its petition for rehearing having been denied by the Commission, Willmut petitioned for judicial review of the order of March 10, 1960, making these contentions:

(1) That the Commission had no authority under the Act to permit United to file or make effective increased rates superseding previously filed increased rates which were being investigated; that the Commission's duty was either to reject the filing of February 11, 1960, or to accept it and at the same time to disallow previously filed increases and order refunds with respect thereto;

(2) That the Commission abused its discretion in accepting for filing United's latest rate increases; that it should have exercised its power under Section 16 of the Act to order maintenance of the *status quo* during the entire period of investigation, which could have authorized rejection of the new schedules;

(3) That the Commission erred in not rejecting the latest filing on the ground it showed on its face that the increased rates fixed therein were unlawfully discriminatory and preferential.

There may be doubt as to whether Willmut, which did not become a party to the proceeding to investigate United's

new rates until after its petition for review had been filed in this court, can obtain review of an order entered before its intervention; or whether it can be said that this order, which merely initiated the proceedings, can correctly be called "an order issued by the Commission in such proceeding" which will be judicially reviewed at the petition of a party aggrieved thereby; or whether Willmut was aggrieved by the order, which in direct terms did no more than suspend and direct a hearing concerning the changed rates of which Willmut complains. *Cf.* Section 19(b) of the Natural Gas Act, 52 STAT. 831 (1938), 15 U.S.C. § 717r(b). But, as these questions were not suggested by the opposing parties—except that the aggrievement question was mentioned but not pressed—we resolve any such doubt in Willmut's favor, and proceed to consider the reasons it advances for reversal of the order of March 10, 1960.

Willmut's first point, that the Commission had no authority to permit United to file or make effective increased rates superseding previously filed increased rates which were then still under investigation, is not well taken. Under its rate-making and rate-changing power, which we shall show is not affected by the Natural Gas Act, United could change at will the rates offered to customers, since it had established them *ex parte* and not by contract. Moreover, Section 4(d) of the Act does not give the Commission discretion to reject schedules of increased rates tendered by a natural gas company; on the contrary, Section 4(d) requires that new schedules be filed with the Commission when notice of a rate change is given. The Commission's power with respect to a filed increase is found in Section 4(e): to initiate a hearing as to the lawfulness of the changed rates, to suspend their effectiveness for a time, and to order refunded that portion of the increase which, after hearing, it determines to be unlawful. Thus the Act provides for investigation of changed rates which have been filed; but it does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in

rates, or that it may summarily reject or disallow the new schedule without a hearing.

The petitioner argues that the filing of new rates, which supersede earlier increases already under investigation, destroys the Commission's jurisdiction to continue its inquiry into the lawfulness of the previous increases, because the filing of superseding rates converts those which are superseded into past rates concerning which the Commission has no authority.

If this were true, a natural gas company whose newly-increased rates were being investigated by the Commission could render them immune from further scrutiny by the simple expedient of filing another increase. To avoid this result of its argument, which obviously it does not desire, Willmut contends that, if a new filing for increased rates is accepted, the Commission "must dismiss the pending proceedings [which are hearings concerning the lawfulness of previous increases] for lack of jurisdiction to entertain them, disallow the rates at issue therein, and order refund of all amounts collected by virtue of them."

Willmut thus suggests an incongruous procedure: that jurisdiction be disclaimed with reference to earlier increases, but that nevertheless it be exercised by disallowing the rates fixed in the previous filings, and ordering refunds. We find nothing in the Act or in the decisions which authorizes the Commission to disclaim further jurisdiction in a pending Section 4(e) hearing because another rate increase was filed during its pendency. And we are unwilling to hold, in the absence of controlling judicial precedent or express statutory provision requiring us to do so, that increased rates which are the subject of unfinished hearings under Section 4(e) must or may be summarily disallowed because the natural gas company files a schedule of new increases.

On the contrary, we hold that, when the Commission orders suspension of and a hearing with respect to increased

rates, its jurisdiction to investigate the lawfulness of the increase is not lost merely because the natural gas company later files for a still larger increase. In such circumstances, the Commission has authority to continue its investigation as to whether the rates previously filed were lawful for the period from the date of filing until they were superseded by a later filing, and to order a refund of the amounts collected during that period which it thereafter determines to have been unlawful. From this it follows that the Commission did not err in permitting United to file and make effective the increases of February 11, 1960, even though that filing superseded earlier and smaller increases which were still under investigation.

We turn to consider the petitioner's second point: that the Commission abused tis discretion in accepting for filing the increased rates tendered on February 11, 1960. On this point, Willmut's theory appears to be that the Commission erred in failing to issue orders under Section 16 of the Act which would "prevent Section 4 of the Act from being used as a vehicle for piling increase upon increase with such frequency and regularity as to foreclose any hope of either fixing lawful rates for the present and future or giving any rate stability." Had the Commission issued such preventive orders under Section 16, says Willmut, it would have been justified by them in rejecting United's latest filing.

In considering this contention, it is necessary to determine whether Section 16 of the Act authorizes the Commission to enter an order or adopt a rule or regulation which would permit it, in some circumstances, to refuse to receive for filing a new schedule showing changes in rates tendered by a natural gas company pursuant to the mandate of Section 4(d).

Section 16 of the Act speaks in broad and general terms: it provides, *inter alia*, that "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out

the provisions of this act." But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e). As the Supreme Court said in the *Mobile* opinion,[6] "The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation, which Willmut suggests, would deny to United the right to change rates at which it offers service, which the *Mobile* decision says is the right of a natural gas company. Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission.

Willmut's suggestion that United has used Section 4 of the Act "as a vehicle for piling increase upon increase" mistakes the nature and purpose of that section of the statute. The "vehicle" which United has used is one of its own inherent rate-making and rate-changing powers which the Supreme Court has said exists unaffected by the Natural Gas Act, and has described as the power "to establish *ex parte,* and change at will, the rates offered to prospective customers." The Supreme Court went on to say, ". . . [Section] 4(d) means simply that *no* change—neither a unilateral change to an *ex parte* rate nor an agreed-upon change to a contract—can be made by a natural gas company without the proper notice to the Commission."[7]

It may be that, under its power to change at will the rates which it established *ex parte* and offered to prospective customers, United has been "piling increase upon increase,"

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[6] United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 343 (1956).

[7] *Ibid.*

with result which Willmut finds oppressive and thinks unreasonable and unlawful. But Section 4(d) does not forbid such successive filings; it merely requires that notice thereof be given to the Commission so it may investigate their lawfulness. So, if "piling increase upon increase" is to be forbidden, legislation to that effect must be adopted.

We are not impressed by Willmut's argument on its third point, that the Commission erred in not rejecting the latest filing as being unlawfully discriminatory and preferential on its fact. As we have seen, a natural gas company has the duty imposed by Section 4(d) to file with the Commission new schedules reflecting changes in rates. The Commission was not authorized to reject the filing in this case on any ground appearing on its face. Its only statutory authority was to enter upon a hearing concerning the lawfulness of such rates, to suspend their effectiveness for a time, and after full hearing to make such orders with reference thereto as would be proper in a proceeding under Section 5(a) of the Act.[8]

For the reasons given, we uphold the Commission's order.

Affirmed.

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[8] Section 5(a), 52 STAT. 823 (1938), 15 U. S. C. § 717d(a), is as follows:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

June Term, 1961

No. 6483

AMERADA PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 6498

AMERADA PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petitions to Review Orders of the
Federal Power Commission

(Decided July 24, 1961)

Kenneth Scott (*Robert J. Stanton, Joseph W. Morris,* and *John S. Miller* were with him on the brief) for Petitioner.

John D. Lane (*John C. Mason,* General Counsel; *Howard E. Wahrenbrock,* Solicitor; and *Luke R. Lamb,* Assistant

General Counsel, were with him on the brief) for Respondent.

Before BRATTON, LEWIS and BREITENSTEIN, *Circuit Judges.*

BRATTON, *Circuit Judge:*

Section 4(c) of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. §717 et seq. requires natural gas companies subject to regulation to file with the Federal Power Commission schedules of rates and all contracts which in any manner affect or relate to rates. Section 4(d) provides that unless the Commission orders otherwise no change in rates shall be made except after thirty days' notice to the Commission, the notice stating the change or changes to be made in the schedule or schedules then in force and the time when such change or changes will go into effect. Except in cases of industrial rates, section 4(e) empowers the Commission to suspend new schedules for a period of not more than five months beyond the time they otherwise would go into effect pending a determination of their reasonableness. The section further provides that if the Commission has not reached a decision before the period of suspension has expired, the filed rate shall on motion of the natural gas company go into effect. Section 5(a) vests in the Commission power, after a hearing, to modify rates which it determines are unjust, unreasonable, unduly discriminatory, or preferential. Section 16 grants to the Commission power to perform any and all acts and make such rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act. And section 19(b) makes provision for judicial review of orders issued by the Commission.

Amerada Petroleum Corporation, a producer of natural gas, is subject to regulation under the Act. It sold gas to El Paso Natural Gas under nine sales contracts which it filed with the Commission as rate schedules. The contracts each contained a favored nation provision. By virtue of

such provisions, El Paso Natural became obligated to increase its payments for gas under six of such contracts, effective October 1, 1959; and by virtue of like provisions, El Paso became obligated to increase its payments under the other three contracts, effective October 9, 1959. On August 31, 1959, Amerada filed with the Commission notices of change in rates under the six contracts; and on September 8, it filed like notices of change under the three contracts. By orders issued September 25 and October 7, 1959, the Commission suspended these rate changes, respectively, until March 1 and March 9, 1960, respectively. On October 26, 1959, Amerada and El Paso Natural renegotiated the nine contracts. The renegotiated contracts fixed the sales price of gas at a figure in excess of that specified in the original contracts and the increase under the favored nations provisions combined. On November 30, the renegotiated contracts were filed with the Commission as supplements to the original rate schedules and as notices of change in rates. By order issued December 18, 1959, the Commission accepted the filings and suspended the rate increases until June 1, 1960. On February 5, 1960, the Commission advised Amerada by letters that the filings of August 31 and September 8, 1959, were regarded by the Commission as superseded by those of November 30, 1959, and, therefore, the former proceedings were terminated as moot. Amerada filed motions to place in effect on March 1 and March 9, 1960, respectively, the increases of which notice has been given in August and September. On March 7, it filed petitions for rehearing and reconsideration of the letter orders of February 5, 1960. On April 5, 1960, the Commission issued its order granting the petitions for rehearing, vacating the letter orders, reinstating the August and September, 1959, filings, and rescinding permission to file the rate changes tendered on November 30, 1959. On April 25, 1960, Amerada refiled the supplemental rate schedules which the Commission rejected by its order of April 5, 1960. By order dated May 25, the Commission sus-

pended until November 1, 1960, use of the increase in rates embodied in the refiled supplemental schedules. And by petitions under section 19(b) of the Act, Amerada brought here for review the orders of the Commission of February 5 and May 25, 1960.

Except as restricted by express or implied provisions in the Act, natural gas companies possess the same freedom in respect to the making of rates that they would have in the absence of the Act. The Act does not purport to grant or to take from natural gas companies their power to make rates initially, by contract or otherwise, subject to rejection or modification upon a finding of the Commission that they are unlawful. Considered as a whole, the Act establishes a comprehensive statutory scheme under which rates are established initially by action of natural gas companies with the Commission exercising powers of review. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332. And natural gas companies are free to effectuate changes in rates from time to time, but they are subject to procedures and limitations of the Act. United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103.

The order of April 5, 1960, is attacked on the ground that the Commission did not have authority to reject the notices of change in rates because the changes were to be made during the period when prior rate changes relating to the same gas were suspended. Pinpointing, the substance of the challenge is that the Act contains no restriction upon making rate changes during periods when prior rate changes relating to the same gas are suspended. The order stated that the Commission's general policy and interpretation of the Act had been that a rate in effect prior to the suspension continues in effect during the suspension period and shall not be changed during such period. It was further stated that the November 30, 1959, filings proposed to change rates under suspension and, therefore, were

subject to rejection. It was further stated that since such action was considered less onerous to Amerada, the Commission considered the changes as superseding the prior filings. And it was further stated that, in view of Amerada's opposition to such action, and consistent with the Commission's general policy and interpretation of the Act, it was deemed necessary and proper for the enforcement of the Act to rescind the Commission's prior permission to file the November 30, 1959, changes and reject them without prejudice to their resubmittal; to vacate the letter orders dated February 5, 1960; to reinstate the suspension proceedings; and to reinstate the supplements tendered for filings on August 31, 1959, and September 8, 1959. Section 4(d) of the Act concerns itself with the making of changes in rates. It forbids the making of changes without notice thereof being given to the Commission for at least thirty days before such changed rates are to go into effect. And it provides that the notice shall state the change or changes to be made in the schedule or schedules "then in force" and the time at which the changed rates shall go into effect. Considered as a whole, the section bears a clear token of Congressional implication that the power of a natural gas company to make a change or changes in rates is limited to the rate or rates in force and effect at the time of the change or changes. Moreover, by section 16 of the Act, the Commission is expressly vested with power "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders . . . as it may find necessary or appropriate to carry out the provisions of this Act." Manifestly, that is a sweeping grant of administrative authority to be exercised in the sound discretion of the Commission. In the exercise of such power, the Commission has consistently declared its policy and interpretation of the Act to be that during the suspension of a rate, the prior existing rate schedule continues in effect and shall not be changed. 18 CFR §§ 2.4(f) and 2.52, page 37. Congress has not taken steps directly or indirectly disapprov-

ing such policy and interpretation. And that administrative interpretation is to be accorded appropriate consideration in arriving at a judicial construction of the Act. Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U.S. 137, 154. Considering the statute and the regulations together, we entertain no doubt that the Commission was clothed with authority to enter the order of April 5, 1960.

The order of May 25, 1960, is challenged on the ground that its effect was to suspend Amerada's rate changes for a period in excess of the statutory limit of five months from the time they otherwise would have gone into effect with a resulting loss in revenue to Amerada during such excess. The contention is based upon the premise that it was of no moment that the first increases were suspended at the time the second increases were to become effective. That which has been said makes obvious that the premise is without sustainable foundation. The effective date of changed rates after suspension has reference to a valid filing. The period has no reference to the filing of an invalid change.

The orders of the Commission are severally

Affirmed.

APPENDIX C

Natural Gas Act, Section 4, 15 U.S.C. 171c:

"Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable, is hereby declared to be unlawful.

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission, shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formay pleading by the natural gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas com-

pany to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Natural Gas Act, Section 5(a), 15 U.S.C. 717d(a):

"Sec. 5.(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State Commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

Natural Gas Act, Section 16, 15 U.S.C. 717c:

"Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make,

amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner in which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours."

Regulations Under the Natural Gas Act, Section 154.66:

"(a) *Withdrawal of suspended tariffs, executed service agreements or parts thereof.* Where a tariff, executed service agreement or part thereof has been suspended by the Commission, it may be withdrawn during the period of suspension only by special permission of the Commission upon application therefor and for good cause shown.

"(b) *Changes in suspended tariffs, executed service agreements of parts thereof.* A natural-gas company may not, within the period of suspension, file any change in a tariff, executed service agreement of part thereof which has been suspended by order of the Com-

mission except by special permission of the Commission granted upon application therefor and for good cause shown.

"(c) *Changes in tariffs, executed service agreement or parts thereof continued in effect, and which were to be changed by the suspended filing.* A natural-gas company may not, within the period of suspension, file any change in a tariff, executed service agreement or part thereof continued in effect by operation of the order of suspension, and which was proposed to be changed by the suspending filing, except by special permission of the Commission granted upon application therefor and for good cause shown."

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No. 506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

WILLMUT GAS AND OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
UNITED GAS PIPE LINE COMPANY,
Respondents.

BRIEF OF RESPONDENT, UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF OF RESPONDENT, UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER-STATEMENT OF FACTS

(a) The Proceedings before the Federal Power Commission.

United,[1] a natural gas company, sells and delivers natural gas to Willmut under forms of Service Agreements on file with and approved by the Commission, identical with the *Memphis* type (*United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division* (1959) 358 U.S. 103),

[1] In this Brief Petitioner Willmut Gas and Oil Company will be referred to as Willmut; Respondent Federal Power Commission will be referred to as Commission; Respondent United Gas Pipe Line Company will be referred to as United; the Natural Gas Act will be referred to as the Act, Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 USC (717, et seq). All emphasis in this Brief is added unless otherwise noted.

On November 2, 1954, by Opinion 277, 13 FPC 398, the Commission approved settlement of a Section 5(a) proceeding involving all of United's rates. Thereafter costs and expenses, particularly cost of gas purchased by United from producers, have steadily increased. Keen competition for gas supplies has contributed to steady increase in their purchase cost. Stating in the filings of increased rates that such were chiefly due to increased costs of gas supplies and to maintain reasonable balance and accommodation between increased costs and revenues, United, pursuant to Section 4(d) of the Act has filed the following proceedings: (1) Docket G-9547, filed September 30, 1955, effective as of April 1, 1955; (2) Docket G-10592, filed May 15, 1956, effective as of November 16, 1956; (3) Docket G-12801, filed May 29, 1957, effective as of December 1, 1957; (4) Docket G-15360, filed May 29, 1958, effective as of December 1, 1958; (5) Docket G-18406, filed March 30, 1959, effective as of October 1, 1959; (6) Docket RP 60-2, filed February 11, 1960, effective as of August 13, 1960; (7) Docket RP 61-18, filed December 15, 1960, effective as of June 15, 1961.

With respect to each of the foregoing dockets: The Commission suspended pursuant to its discretionary powers under Section 4(e) for the maximum period of five months, except as to those rates for resale for industrial use only, which it is prohibited from susupending by Section 4(e). In each docket the rates for resale for industrial use only became effective at the expiration of the 30-day notice period provided by Section 4(d); the suspended rates in each docket became effective at the termination of the five months suspension period of Section 4(e) upon written motion by United. In each docket the Commission required a refund undertaking, pursuant to Section 4(e), as to the suspended rates thus made effective by United's motion. Beginning with the second filing (G-10592) each filing for

increased rates pursuant to Section 4(d) *was made after the termination of the suspension period and after the suspended rates had become effective by the motion of Section 4 (e)*. Each succeeding docket was filed upon the same principles and in the same manner and form as Docket G-9547, United hoping that Commission decision would determine controlling principles dispositive of all dockets, so as to stabilize and remove controversy in United's regulatory relationship with the Commission and its customers, and thus free it to plan intelligently and efficiently for the future to accommodate and serve the increasing requirements of its customers.

Docket G-9547 hearings were concluded October 31, 1956; those in Docket G-10592, on April 9, 1957. The Docket G-9547 record was introduced into Docket G-10592, accomplishing de facto consolidation.

Briefing and decision were delayed by *Memphis* (FN 4, opinion below, Pet. App. A, p. 3a)[2]

The final brief was filed January 14, 1959. On August 6, 1959, the Commission directed the Presiding Examiner to decide, apart from figures, the controlling principles in issue in the first two dockets. The Presiding Examiner issued his opinion on April 5, 1960. United and others filed exceptions upon which the Commission heard oral argument on July 12, 1960. The Commission issued its order and decision on January 4, 1961, reversing certain portions, affirming other portions, of the Presiding Examiner's decision. The Commission indicated its decision pointed to disposi-

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[2] Willmut secured from the District of Columbia Court of Appeals an opinion identical with its *Memphis* opinion, *Willmut Gas and Oil Company* v. *Federal Power Commission, et al* (1957 251 F2d 381, later set aside and conformed to this Court's decision in *Memphis*, 275 F. 2d 877.

This cause is Willmut's second suit challenging basic power of the Commission to permit and receive filing of the same two dockets involved in its *Memphis* type litigation. It has already filed a third challenge to the Commission decision of January 4, 1961 on the merits of the first two dockets, sub nom *Willmut Gas and Oil Company* v. *Federal Power Commission et al*, No. 16245, in the Court of Appeals for the District of Columbia Circuit, which was orally argued October 16, 1961, not yet decided.

tion of all dockets, but Willmut and other parties objected and the remaining dockets are now set for hearing November 28, 1961.

Meanwhile, on April 20, 1959, some 20 days after United's filing, Willmut filed at Docket G-18406 a petition to reject that filing, listing in the caption all prior filings beginning with Docket G-9547 (R. 3706), upon grounds approximately identical with those involved in this cause. United answered (R. 3728). The Commission, on April 20, 1959, issued an order, as here, suspending the filing at docket G-18406, subject to Section 4(e) hearing (R. 3725), which denied Willmut's petition.

Willmut attempted to file a petition for rehearing (R. 3877) after expiration of the time permitted by Section 19(a); the Commission rejected (R. 3913), no appeal under Section 19(b) was attempted. The Commission's rejection became final.

When Docket RP 60-2 was filed, Willmut filed a new petition to reject, practically identical with that at Docket G-18406, and again captioned all docket numbers beginning with Docket G-9547 through Docket G-18406, and including Docket RP 60-2 (R. 4601).[3] United answered (R. 4615). The Commission, on March 10, 1960, (R. 4648) rejected, tracking the path followed in Docket G-18406. Willmut petitioned for rehearing (R. 4881); the Commission on May 5, 1960, denied (R. 4966).

(b) The Judgment of the Court of Appeals.

Willmut sought review pursuant to Section 19(b) of the Act to set aside the Commission's order. The Commission appeared in defense of its order, and United intervened in defense of the order.

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[3] Docket RP 61-18 was not then filed, and so is not involved in Willmut's instant motion.

The Court of Appeals affirmed the Commission's order (App. A, Pet. p. 1a, et seq).

It ruled that Willmut's first contention that the Commission had no authority to permit United to file or make effective increased rates superseding previously filed and effective increased rates still being investigated was not well taken.

It reasoned that United's rate-making and rate-changing power was not affected by the Act; that United could change at will the rates offered to customers since it had established them ex parte and not by contract. It declared that Section 4(d) gave the Commission no discretion to reject schedules of increased rates filed by the natural gas company; but on the contrary required such to be filed with the Commission when notice of change was given. The Commission's power with respect to a filed increase was to be found in Section 4(e):

> "To initiate a hearing as to the lawfulness of the changed rates, to suspend their effectiveness for a time, and to order refund of that portion of the increase which, after hearing, it determines to be unlawful."

Thus, it held, the Act provided for investigation of changed rates; but did not contemplate Commission power to refuse to file a tendered new schedule of changed rates, or summarily to reject or disallow such new schedules without hearing.

It rejected as "an incongruous procedure" Willmut's argument that the filing of new rates, which superseded earlier increases then under investigation, destroyed Commission jurisdiction to continue or dispose of its inquiry into the lawfulness of the earlier rates, because the filing of superseding rates converted those superseded into past rates, concerning which the Commission had no authority. For, it reasoned, if Willmut's position were true, a natural

gas company could insure its newly increased rates from further Commission scrutiny by the "simple expedient" of new filings. To avoid this, which the Court said Willmut "obviously * * * does not desire", Willmut contended that the Commission must dismiss pending proceedings involving lawfulness of previous increases for lack of jurisdiction to entertain them, but disallow such increases and order refund of all collections thereunder. Thus Willmut's suggestion was that jurisdiction to consider be denied but consideration exercised to reject and disallow such rates and to order refunds (an exercise of power on the merits.) The Court found nothing in the Act or decisions authorizing such Commission disclaimer of jurisdiction in a pending Section 4(e) hearing because another rate increase was filed during pendency. It declared itself unwilling to hold, "in the absence of controlling judicial precedent or express statutory provision requiring us to do so" that the Commission "must or may" summarily dismiss or disallow in such circumstances.

On the contrary, it declared its holding to be that Commission jurisdiction to investigate lawfulness of increased rates "is not lost merely because the natural gas company later files a still larger increase." It declared the Commission had authority to continue investigation of lawfulness of such previously filed rates "for the period from the date of filing until they were superseded by a later filing, as well as to order a refund of collections during that period which it thereafter determined to have been unlawful."

It held the Commission justified in permitting United to file and make effective the increases of February 11, 1960 (RP 60-2), even though that filing superseded earlier increased rates still under investigation.

The Court found without merit Willmut's second contention that the Commission abused its discretion in accepting the filing of increased rates in RP 60-2.

It said Willmut's contention was that the Commission erred in not exercising power contended existing under Section 16 which would "prevent Section 4 from being used as a vehicle for piling increase upon increase with such frequency and regularity as to foreclose any hope for fixing lawful rates for the present and future or for giving any rate stability." The Court reasoned that the broad power of Section 16 did not authorize an order or regulation which would nullify or restrict the right of the natural gas company to change rates subject only to the Section 4(d) requirement of notice to the Commission so that the Commission might proceed pursuant to Section 4(e). It said this Court in *Mobile* (1956) 350 U.S. 332, 343, declared that the rate-making and rate-changing power of the natural gas companies "remain undefined and unaffected by the Act." Willmut's suggestion, the Court declared, would authorize the Commission to reject a filing pursuant to the mandate of Section 4(d) and this clearly was "such an order or regulation [as] would amount to a legislative change, which is beyond the authority of the Commission."

It did not find persuasive or tenable the suggestion that United has used Section 4 "as a vehicle for piling increase upon increase"; rather it said the "vehicle" was United's "own inherent rate-making and rate-changing powers", which *Mobile* said were unaffected by the Act, and which were tantamount to the power "to establish, ex parte, and change at will, the rates offered to prospective customers." Since Section 4(d) does not forbid such successive filings but merely requires notice to the Commission so it may investigate lawfulness, Willmut's contention, if upheld, would require legislation to that effect, amendatory of the Act.

Willmut's third contention, not advanced here, that the filing was discriminatory upon its face was rejected out of hand "because the Commission was not authorized to reject

such filing on any ground appearing on its face." Again, it admonished that the Commission's "only statutory authority was to enter upon a hearing concerning the lawfulness of such rates, to suspend their effectiveness for a time, and *after full hearing* to make such orders with reference thereabout as would be proper in a proceeding under Section 5(a) of the Act."

COUNTER-QUESTION PRESENTED

Whenever a natural gas company files notice of increased rates pursuant to Section 4(d) of the Natural Gas Act which the Commission suspends subject to hearing and decision pursuant to the discretionary power of Section 4(e) and which thereafter become effective under said Section, is not the Commission, even though a subsequent filing or filings of increased rates be made prior to final disposition of the first filing and which subsequent filing or filings may be suspended and thereafter made effective, expressly required by Section 4(e) to complete and dispose of such statutory review and determination of the lawfulness of such first suspended rates?

ARGUMENT

The well reasoned opinion below clearly and definitively disposes of Willmut's contentions. Its analysis of the Act is convincing demonstration that the Act does not authorize the Commission to do and order that which Willmut sought. Indeed, that analysis makes clear that Willmut's petition would require the Commission to assume and exercise substantive power not granted but denied by the Act. As that Court points out, if the Commission is to have and exercise such power, "legislation to that effect must be adopted" by the Congress.

1. The Basic Act is the Sole Source of Commission Jurisdiction and Power.

The jurisdiction of the Commission is derived wholly from the Act. It has and may exercise only such jurisdiction or power as the act expressly sets forth and confers. Such power may not be augmented by implication, or by regulation, or by decision. It thus possesses no inherent powers by virtue of its existence. The Act does not bestow upon it any judicial or equitable powers to make decisions and orders which it, in its general judgment, may believe to be proper, just, or reasonable.

This Court, dealing with the problem of jurisdiction of administrative bodies in *Arrow-Hart & H. Elec. Co.* v. *Federal Trade Commission* (1934) 291 US 587, declared:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; but, that accomplished, has not the additional powers of a court of equity to grant other and further relief by ordering property of a different sort to be conveyed or distributed, on the theory that this is necessary to render effective the prescribed statutory remedy" (p. 598-9).

See, also, *Stark* v. *Wickard* (1944) 321 U.S. 288, 309; *Federal Trade Commission* v. *Sinclair Refining Co.* (1923) 261 U.S. 463, 475-6; *Federal Communications Commission* v. *American Broadcasting Company* (1954) 347 U.S. 284, 290; *Waite* v. *Macy* (1918) 246 U.S. 606.

In *Montana-Dakota Utilities Co.* v. *Federal Power Commission* (1948, 8 Cir.) 169 F. 2d 392, 398, cert. den. 335 U.S. 853, this principle was declared applicable to the Federal Power Act, which, as this Court knows, is substantially like the Act. *Mississippi River Fuel Corp.* v. *Federal Power*

Commission (1953, 3 Cir.) 202 F. 2d 899, pet. for cert. dismissed 345 U.S. 899, applies this principle to the Act. There the Commission summarily rejected and dismissed a filing as being contrary to its Regulations. After pointing out that "The statute which defines the powers of the Commission in natural gas matters makes no provision for any such procedures" (p. 902), the Court re-affirmed the power of the Commission to adopt regulations to require schedules and supporting data to be organized "in convenient and readily comprehensible form". It, however, said:

> "This is not such a case. The Commission has simply refused to recognize as properly before it or retain for action as prescribed by the statute a filing which met all formal requirements. On the face of Section 4 of the Natural Gas Act, relevant portions of which have been set out above, it is clear that, Mississippi's proposed tariff changes having been duly filed, the Commission had only two alternatives. By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. It purported to follow a third course, rejection without hearing — *a course for which it cannot show even color of statutory authority.*" (p. 902).

Arguments were pressed for the need of additional power. to which that Court, with which the court below aligned itself, responded:

> "But the remedy lies with Congress. If changes in the law are needed, or more personnel to administer existing law, or both, it is not for the administrative agency or the courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them. Viewed

> in most favorable light, that seems to us to be what the Commission has tried to do here. It follows that the order of May 29 must be set aside as wholly beyond the authority of the Commission." (p. 903).

If, as is clear, the Commission may exercise only such power as the Act expressly sets forth; it is clear that no act of a natural gas company can abrogate or terminate the jurisdiction conferred by the Act or deprive the Commission of the right or duty to exercise it. The Act nowhere purports to authorize the regulated company to take any action which would impair or restrict or change the power delegated by Congress to the Commission as its statutory agent, nor to deprive the Commission of any duty or power which Congress has directed the Commission to perform. Willmut's argument, then, that the procedures of the Act, which recognize the right of the natural gas company to file increased rates pursuant to Section 4, constitute a Congressional delegation of power that nullifies jurisdiction and the duty to exercise powers expressly laid on the Commission by the Act, is without force.

While the petition buffs and blurs it somewhat, the real thrust of Willmut's position continues, as below, that the Commission is a rate fixing and rate making body. This distorts and mistakes the provisions of the Act, as well as the holding of the Court in *Mobile (United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956) 350 U.S. 332) and *Memphis (United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division* (1959) 358 U.S. 103). The Act gives no power to the Commission to fix rates, but does give power to review both existing and newly changed rates. Only the natural gas company has power to fix initially or change rates. *Mobile, supra; Memphis, supra; Pennsylvania W. & P. Co.* v. *Consolidated G.E.L. & P. Co.* (1950, 4 Cir.) 184 F. 2d 552, cert. den. 340 U.S. 906; *Montana-Dakota Utilities Company* v. *Northwestern Public Service Co.*,

supra; Hope Natural Gas Co. v. *Federal Power Commission* (1943, 4 Cir.) 134 F. 2d 287, reversed on other grounds 320 U.S. 591; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (1907) 204 U.S. 426; *United States* v. *Illinois Central Railroad Co.* (1924) 263 U.S. 515.

The rationale of the foregoing cases, culminating in *Memphis*, may be stated to be that when a given rate, because of business conditions, becomes unfair, unjust and unreasonable, the regulated company has the power to demand fair, just, and reasonable rates. The statutory prescription of "reasonableness" is the standard, and the decision of the regulated company is always subject to the Commission's review statutorily provided. This free right of the regulated company to fix and establish rates exists, as *Mobile* puts it, as it would in the absence of the Act. Its power in that respect is limited only where in the absence of the Act it would lack the power, as for instance in *Mobile* where United was held to have "contracted away" such power.

Thus the power of the regulated company initially to fix or change rates is unaffected by the Act and is co-extensive with the powers thereabout possessed in the absence of the Act.

The Commission's power of review exists equally under Sections 4 and 5. If the Commission finds an existing or newly changed rate to be too high, it is empowered to direct reduction to the level it finds to be the just and reasonable level. If the filed rate be below the just and reasonable level, it is equally empowered to authorize or direct the natural gas company to file increased rates. This power by express direction of the Act is applicable prospectively, but this is the exercise of the function of review, not rate fixing, as Willmut would have it. *Mobile* sums it up as Willmut concedes (Pet. 13):

> "The powers of the Commission are defined by §§4 (e) and 5(a). The basic power of the Commission is

that given it by §5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory or preferential.' This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies, and, if they are determined to be unlawful, to remedy them." (p. 341)

It is thus clear that every filing of increased rates by the natural gas company calls into existence the power of the Commission to review. Upon such a filing, either initially or by change of increased rates, the Commission, as the Court below and the Third Circuit in *Mississippi River, supra,* agree, is presented with two alternatives, i. e., it can fail to act and permit initial or increased rates to become effective; it can suspend and review. It is thus clear that such filings cannot subvert or destroy or deprive the Commission of the exercise of its statutory powers.

2. The Express Provisions of Section 4(e) Determine the Question Posed Here.

If the Commission adopts the second alternative of Section 4(e) and suspends pending review, the same Section obliges the Commission to exercise such review power and determine lawfulnss. A lawful rate, as Section 4(a) provides, is a just and reasonable rate, the identification of which is the goal of Commission review. It is clear, then, that the public interest, and the basic rights and protection of the natural gas company, as well as its customers, require that lawfulness be settled.

Mobile expressly recognizes this, for in speaking of the powers defined by Section 4(e) and 5(a) the Court, addressing itself to Section 4(e), says:

"Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long-

> established or newly changed, but in the latter case the power is further implemented by §4(e). All that §4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract (except 'industrial' rates) the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same — to determine whether the rate fixed by the natural gas company is lawful" (p. 341). (Emphasis by Court.)

This "change" *Mobile* declares, "is *completed* upon compliance with the notice requirement [of section 4(d)] and *the new rate has the same force as any other rate* — it can be set aside *only* upon being found unlawful by the Commission" (p. 342, emphasis added). The Courts have declared that increased rates may not be dismissed without a hearing. *Federal Power Commission* v. *Nat. Gas. Pipeline Co.* (1942) 315 U.S. 575, 583; *Atcheson, Topeka & Santa Fe Railway Co.* v. *United States* (1932) 284 U.S. 248, 262; *Ohio Bell Telephone Company* v. *Public Utilities Commission* (1937) 301 U.S. 292; *Morgan* v. *United States* (1936) 298 U.S. 468. The regulations Willmut relies on (Pet. 16) have no purpose or design to adjudicate what is a change or how a change is made effective — for *Mobile* teaches that the Commission has no such power. They are in character and purpose, procedural. Such regulations are intended to assist the Commission's review as well as to furnish information and data useful in such review which the filing permits if the Commission concludes review is indicated.

Section 154.63 of the Commission's Regulations titled "Material submitted with changes in a tariff, executed service agreement or part thereof" specifies an exhaustive listing of data and material which must accompany such a

filing. This material is of the fullest and most substantial character. The required material is so detailed and definitive as to furnish the Commission with sufficient information to determine lawfulness upon the face of the filing. Thus the Commission has access at the filing to information upon which to base a determination. Equally, it may require a hearing and full evidence. Or it may avail itself of its expertise and the services of its technical staff to make an investigation from the books and records of the natural gas company and from any other source. To make a determination it may combine any of these methods; or it may dispose of the matter by settlement. In any event, where suspension is had pending review, lawfulness during the period of applicability must be determined. Such review must be completed and effectively disposed of.

Section 4(e) gives the Commission discretionary power to suspend but not to exceed five months beyond the date on which the increased rates would normally become effective. It then provides:

> "If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural gas Company making the filing the proposed change of rate * * * shall go into effect."

The section then gives discretionary power to the Commission to require a bond or undertaking for refund "and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." The Commission is expressly empowered "after full hearing, either completed before or after the rate * * * goes into effect [to] make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective." Thus the express language

of Section 4(e) denies and belies Willmut's contentions. Nothing in that language suggests or gives warrant to the claim that a hearing must be completed within six months; or that Commission jurisdiction is ousted, destroyed, or lost either by failure to complete a hearing within six months or to complete and dispose of the hearing prior to the time another filing, pursuant to Section 4(d), may be made.

In the Commission and the court below, Willmut claimed that its increase in cost from United's increases in rates over the past seven years was approximately 84%; but was silent in the increase in that period of the prices United must pay to purchase the gas which guarantees its continued service.[4] Neither dollars nor percent affect the answer, for the Act obligates the Commission in its review to determine propriety of the expenses. If justified, rates must be approved to recoup them; if unjustified, lawful level of rates must be set and refunds ordered as provided by Section 4(e).

Pipeline companies cannot be compelled to incur expenses not returned. Any effort to do so, such as Willmut proposes, would render the Act unconstitutional, for thereby United would be deprived of its property without due process and without constitutional compensation.

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[4] United has attached App. B. (the only difference from a similar one attached as Ex. B below, being the actual figures for actual periods of RP 60-2, since become available) showing in columnar form for each docket number the applicable period for each series of rates; the increased revenues subject to Commission jurisdiction at rates in the filing over former approved rates; together with the increased gas cost budgeted in each docket and its related percent of such amount to increased revenues, and finally the amounts actually paid for gas in each period. This compares the budgeted cost with actual experience. It discloses the steady increase in purchased gas cost which principally caused the filings. The struggle for gas supply becomes sharper day by day as the demand for natural gas, and the number of users, increases. This, in addition to the fact that costs of labor and and supplies steadily mount: emphasize the wisdom of this Court's admonition in *Memphis* that business reality demands that natural gas companies should not be precluded by law from maintaining economic balance of intake and outgo through increased prices.

Willmut's position, if sustained, would destroy possibility of continued economic health and life of the pipelines, and thus would defeat its own purposes. Achievement of balance between pipelines and customers which follows determination of allowable costs subject to recoupment from customers is the legitimate and lawful duty contemplated by the filing and review which Section 4 permits. The performance of a lawful act, whether a filing by a natural gas company or completion of the hearing as authorized, neither renders unlawful a former lawful act nor destroys or emasculates Commission jurisdiction or its duty to discharge the function which Congress delegated to it.

Section 4(e) alone is ample authority requiring Willmut's acceptance and affirmance of the Commission's order.

Willmut's confusion is increased by its notion that a subsequent filing turns a prior filing into a "past period" outside the ambit of Commission power.

Section 4(e) expressly authorizes the Commission's order to be retroactive to the effective date of such rates, and we have demonstrated that this is not destroyed by a subsequent filing. Its exercise cannot be outside the ambit of the Act, for its power is explicitly declared.

The power and jurisdiction conferred by Section 4(e) is continuously available even though it may be spent in a given case by its exercise to completion. Being continuously available, it may be employed over and over in recurring similar situations. The Act nowhere declares that the Commission shall lose power to complete a review proceeding merely because it shall not have completed such review before another filing be made.

Equally, there is nothing in the Act which prohibits an additional filing pursuant to Section 4(d) when a Section 4(e) review pends uncompleted before the Commission. If, as Willmut contends, such a filing obliterates Commission

power to complete statutory review, then the natural gas company would be deprived of its right to protect itself against rising costs. This, in turn, would reduce, if not destroy, the ability to render service to the consumers. This would be contrary to the protection of its "legitimate interest" which *Memphis* said was the concern both of the Commission and the consumers. (358 U. S. at p. 113-4, No. 3)

In fact, Willmut's claim of loss of jurisdiction is nonsensical. The court below termed it "incongruous". On the one hand it contends a filing destroys and ousts jurisdiction; on the other, it contends that jurisdiction continues and must be exercised, even to determine on the merits and order that the filing was not justified and directing a refund. Willmut's contention carried to logical conclusion would mean that the loss of jurisdiction would deprive the Commission of the right to review, and thus the rate having been made fully effective in accordance with the terms of the Act, would remain the legal rate, and that would end the matter.

The effect of successive filings, including most of the docket numbers in the caption of Willmut's petition to reject, were specifically called to the attention of this Court in the *amicus* brief which Willmut filed in *Memphis* under the borrowed name of City of Hattiesburg, Mississippi (p. 3, 40 Amicus Brief in Nos. 23, 25 and 26, October Term, 1958, in *Federal Power Commission* v. *Memphis Light, Gas and Water Division.*) This Court was not persuaded.

Willmut raises again its complaint on the industrial resale situation. In United's reply brief in *Memphis* (pp. 18-19), it disclosed that Willmut in its industrial resale rate schedule contracts expressly reserved the right to pass all such increases along. The Court put this in proper perspective in footnote 10 (358 U.S. 115).

Willmut complains of delay in the Commission in disposition of review proceedings. United is neither responsible for, nor in a position to control or prevent what Willmut calls "delay". Willmut, however, is in a position to protect itself wholly, as it has already done with respect to industrial resale rates, or to make proper and diligent application to the proper local authority for protection against rising costs. The fundamental law requires that lawful rates be permitted, else confiscation would result, and thus Willmut is adequately equipped to protect its right to recoup its cost of service to its own customers.

Finally, Willmut argues that the purpose of the Act is to protect consumers against exorbitant rates for gas, and that filings under Section 4(d) can, in its opinion, produce exorbitant rates because of Commission inability to hear and determine within the time Willmut believes proper. The Supreme Court in *Memphis* adequately thus answered this position:

> "United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so. The Act comes into play as to rate changes only in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission, in the case of rates for sales of gas for other than exclusively industrial use, to suspend the new rates for a five-month period and thereafter to require the posting of a refund bond pending a determination of the lawfulness of the rates as changed. (see §4(d), (e), at note 3, supra).
>
> "It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, *but was also manifesting its concern for the legitimate interest of*

natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible. This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry, cf. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603, and we think that it did so not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, 350 U.S. at 344 (subject, of course, to any overriding authority of the Commission) but also by providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review." (pp. 113-114)

3. The Commission's Construction of Section 4(e) Accords with United's Construction.

The Commission over the years has consistently construed Section 4(e) to authorize and empower it to dispose of the review of suspended rates even though subsequent filings have been made and become effective. Such long-continued administrative interpretation, while not controlling on the Courts, is persuasive and entitled to great weight. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission* (1956, 3 Cir.) 232 F. 2d 467, 471; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission* (1960) 364 U.S. 137, 154; *Federal Trade Commission* v. *Mandel Bros., Inc.* (1959) 359 U.S. 385, 391, and cases cited; *Coombe* v. *U.S.* (1925) 3 F. 2d 714, 716; *Hecht Co.* v. *McLaughlin* (1954) 214 F. 2d 212, 214-5.

Appendix A lists 70 proceedings over a ten year period where prior suspended filings made effective under Section 4(e) were followed by subsequent filings which were suspended and thereafter made effective under Section 4(e), and in which the Commission exercised its power of review to determine lawfulness of prior filings during their period of applicability. These 70 instances seem comparable to the experiences *Panhandle* notes.

Such proceedings have been disposed of in harmony with the various methods available to the Commission (See p. 14-15 infra.) Appendix A shows also those instances where there has been judicial review. None of them disclose an objection by a party to Commission jurisdiction on grounds which Willmut advances. Though the statutory review is limited to keeping the Commission within the bounds which Congress has created (*Colorado Interstate Gas Co.* v. *Federal Power Commission* (1945) 324 U. S. 581; *Hope Natural Gas Company* v. *Federal Power Commission* (1943, 4 Cir.) 134 F. 2d 287, reversed on other grounds, 320 U.S. 591; *Prentis* v. *Atlantic Coast Line Co.* (1908) 211 U. S. 210; *B. & O. Railway Co.* v. *United States* (1924) 264 U. S. 258; *Home Telephone & Telegraph Co.* v. *Los Angeles* (1908) 211 U.S. 265; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.* (1947, 5 Cir.) 162 F. 2d 388, cert. den. 332 U.S. 770), no Court on its own motion dismissed the judicial review on the ground that the Commission lacked jurisdiction to determine lawfulness.

All of such cases recognize and proceed upon the existence of Commission jurisdiction. Indeed, one, *Michigan-Wisconsin Pipe Line Co.* v. *Federal Power Commission* (1959, 6 Cir.) 263 F. 2d 553, compares and contrasts the function of Commission review as to what it terms the "impoundment period", otherwise generally known as the "closed-in" period, and the "locked in rate", being the rate during the applicable period before superseding rates are

made effective, from that purpose and function when the Commission reviews rates for future applicability, which the opinion calls the review for the "indefinite future". The Sixth Circuit reviewed a Commission order on lawfulness of rates which had been suspended under Section 4(e) but which had thereafter by a subsequent filing been superseded. It found no want of power, and determined the case upon the merits of the order.

United thus respectfully submits that the administrative interpretation which has continued over the years and which has been approved by the cases listed in Appendix A authoritatively interpret Section 4(e) contrary to the claims and contentions advanced by Willmut herein.

4. The Decision Below Does not Conflict with Amerada.

Willmut's claim that the decision below conflicts with that of the Tenth Circuit in *Amerada Petroleum Corp.* v. *Federal Power Commission* (Pet. App. B) is without substance. The all important distinction it confesses (Pet. p. 7) it ignores.

The further claim that there is "sharp conflict between the two courts" on the proper interpretation of *Mobile* and *Memphis* and the "nature and reach" of Commission authority under Section 16 of the Act, (Pet. p. 6) is surprising. For a reading of the two decisions discloses no conflict, but harmony between the two courts.

Amerada, pursuant to Section 4(d), filed increased rates which the Commission suspended pursuant to Section 4(e). During the suspension period *and before the suspended rates were made effective*, Amerada filed new increased rates (App. B, p. 12a). Pursuant to its policy interpretation for producers, the Commission refused permission to file during the suspension period.

Unlike *Amerada*, every one of United's filings were made *after* earlier suspended rates had become *effective* by the Section 4(e) motion at the termination of the suspension period.

Amerada thus declared the issue:

> "Pinpointing, the substance of the challenge is that the Act contains no restriction upon making rate changes during periods when prior rate changes relating to the same gas are suspended." (App. B, p. 13a)

It rejected this challenge, holding:

> "Section 4(d) of the Act concerns itself with the making of changes in rates. It forbids the making of changes without notice thereof being given to the Commission for at least thirty days before such changed rates are to go into effect. And it provides that the notice shall state the change or changes to be made in the schedule or schedules *'then in force'* and the terms at which the changed rates shall go into effect. Considered as a whole, the section bears a clear token of Congressional implication that the *power of a natural gas company to make a change or changes in rates is limited to the rate or rates in force and effect at the time of the change or changes.*" (App. B, p. 14a)

The Court below was not confronted with the issue of *Amerada*. Naturally, it made no holding in conflict. The filings which the court below considered were made strictly in accordance with *Amerada's* analysis of Section 4(d), as well as the Commission policy which *Amerada* recognized (18 C.F. R. §2.4 (f) and 2.52, page 37 (App. B, p. 14a))

Nothing in the decision below, as Willmut suggests, approves, contrary to *Memphis*, any action by United outside "the procedures and limitations of the Act"; on the contrary the court held that United's filings were properly

handled by the Commission whose order it held entitled to affirmance, because made in accordance with the "procedures and limitations of the Act."

In our submission the assertion of "sharp conflict" between the two courts on the interpretation of *Mobile* and *Memphis* is frivolous.

Equally without merit is the curious position on Section 16. *Amerada* noted that Section 16 gave power to prescribe orders and regulations "necessary or appropriate to carry out the provisions" of the Act. It held that those there involved were procedural regulations in conformity with Section 16. It did not hold that Section 16 authorized regulations creating by amendment new power not granted by the Act. Willmut's contentions on Section 16, said the court below, would make necessary such an amendment, if adopted and enforced. That is not conflict between the two courts on Section 16; that is consonance.

The claim of conflict will not stand examination — it is shown to be non-existent.

5. Willmut's Contentions are Concluded by the Commission's Order of April 29, 1959 at Docket G-18406.

In Docket G-18406 Willmut filed a petition (R. 3706) to reject, in terms practically identical with those contained in the petition filed at Docket RP 60-2, and involved in this appeal. United's answer (R. 3728) was substantially similar to that filed in Docket RP 60-2, (R. 4615). This petition was rejected (R. 3725) by order issued April 29, 1959. Willmut attempted to petition for rehearing (R. 3877) which the Commission rejected (R. 3913) because not filed within thirty days after the issuance of the order as required by Section 19(a) of the Act. No appeal was attempted, and the Commission order became final. The order of April 29, 1959 at Docket G-18406 is res judicata

of the present petition and issues before this Court. See *Brownell* v. *Chase Nat. Bank* (1956) 352 U.S. 35; *Angel* v. *Bullington* (1947) 330 U.S. 183; *United States* v. *Munsingwear* (1950) 340 U.S. 36; *Woods* v. *Cannaday* (1946) 81 App. D. C. 281, 158 F. 2d 184; *United States* v. *New York Terminal Warehouse Co.* (5 Cir. 1956) 233 F. 2d 238; *United States* v. *I.C.C.* (1925) 56 App. D.C. 44, 8 F. 2d 905; *Wheat* v. *Texas Land & Mtg. Co.* (5 Cir. 1945) 153 F. 2d 926, cert. den. 328 U.S. 837; *Crowell* v. *Baker Oil Tools, Inc.* (5 Cir. 1947) 164 F. 2d 487, cert, den. 333 U.S. 880.

This principle is applicable to administrative orders. *Sunshine Anthracite Coal Co.* v. *Adkins* (1940) 310 U. S. 381; *Butte A. & P. R. Co.* v. *U. S.* (1933) 290 U. S. 127; *Hagens* v. *United Fruit Co.* (1943, 2 Cir.) 135 F. 2d 842; *Pillsbury* v. *Alaska Packers' Assn.* (1936, 9 Cir.) 85 F. 2d 758. Cf. Willmut's cases, *Panhandle Eastern Pipe Line* v. *Federal Power Commission* (1956, 3 Cir.) 236 F. 2d 606, and *State Corp. Commission of Kansas* v. *Federal Power Commission* (1953, 8 Cir.) 206 F. 2d 690.

6. Willmut's Other Cases.

Willmut cites no cases that deal with the question of whether the Commission can or should reject a filing made pursuant to Section 4(d) upon the ground that there pends undisposed of a prior suspended but effective filing subject to review under Section 4(e). *State Corporation Commission of Kansas* v. *Federal Power Commission* (1953, 8 Cir.) 206 F. 2d 690 (Pet. 17) alone involved consideration of a Commission order dealing with multiple filings but that case does not assist Willmut. That case involved no rejection of filing; it was a denial on the merits after a hearing. The first proceeding was fully heard and adjudicated. The second proceeding as to certain items was, on motion, dismissed at the conclusion of Northern Natural's case in chief

because those specific items were expressly included in and ruled by the first proceeding. The Court entertained jurisdiction of appeals from both proceedings.

Panhandle Eastern Pipe Line Co. v. *Federal Power Commission* (1956, 3 Cir.) 236 F. 2d 606 (Pet. 17) likewise is inapropos. The Commission did not "summarily" disallow or dismiss, as Willmut states; it held a full hearing. Panhandle claimed that new and changed conditions warranted a different result from that ordered in a previous case. The Court affirmed the Commission's holding that there were no changed or new conditions.

Mobile lends no assistance to Willmut. Willmut lost its effort to take advantage of *Mobile*. See *Willmut Gas and Oil Co.* v. *Federal Power Commission* (1959), 102 App. D. C. 140, 275 F. 2d 877. We have demonstrated infra that *Mobile's* holdings are contrary to Willmut's claims.

Hope Natural Gas v. *Federal Power Commission* (1952, 4 Cir.) 196 F. 2d 803, does not involve either factually or legally the situation or issues here involved. That case was concerned with Hope's efforts to have increased rates made effective prior to expiration of the suspension period. This led to Judge Parker's exposition of the history and underlying reasons for the doctrine of suspension in regulatory statutes — a matter that does not concern this case.

Hope Natural Gas Co. v. *Federal Power Commission* (1943, 4 Cir.) 134 F. 2d 287, Reversed 320 U.S. 591, is a run of the mill review of a Section 5(a) decision rendered after a full and exhaustive hearing. It is notable chiefly because it marks judicial approval of the Commission's method of "original cost" regulation, or the "prudent investment theory". It does note that Section 4 contains the machinery for obtaining rate adjustments. In our submission it furnishes no support for Willmut's claims. Even so, the Court recognized the economic facts of pipeline life, which Section 4 accommodates, when it said:

"With changes in economic conditions rates must be changed from time to time, * * *" (p. 808)

Certainly, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, is of no assistance to Willmut. The District Court rendered a dollar judgment on the plaintiff's claim that because of corporate control it had been compelled to file rate schedules with the Commission that were fraudulent and unlawful. The Court undertook to determine a lawful rate to measure the judgment. The Court of Appeals reversed, holding the trial court was without jurisdiction. The Supreme Court said neither the District Court nor the Commission had power to determine that filed rates in a past period were unjust and unreasonable for such purposes. The rates there were not suspended rates as here. United agrees thoroughly with *Montana-Dakota*, but respectfully submits it throws no light whatever to assist Willmut's contentions here.

Federal Power Commission v. *Nat. Gas Pipe Line Co.* (1942) 315 U.S. 575, lends no assistance. Neither this case nor the reference to page 584 of the opinion (Pet. 18) deal with "filings" or rejection of filings on any ground. The case was concerned with the power of the Commission to issue an interim rate order in a Section 5(a) hearing. Page 584 (to which Pet. 18 refers) speaks only of a hearing in which the natural gas company was permitted to introduce its whole case.

Even if *Episcopal Theological Seminary* v. *F. P. C.* (D. C. Cir.) 269 F. 2d 228, cert. den. sub. nom *Pan American Petroleum Corp.* v. *FPC*, 361 U.S. 895, holds, as Willmut states, (Pet. p. 22)—it does not assist Willmut. Failure of a proponent to carry its burden of proof of lawfulness (see Section 4(e) which expressly lays this burden on the proponent) means the Commission found unlawfulness. The refund, in such circumstances, is merely the execution of

the express direction and power given the Commission for refund by Section 4(e). Mr. Justice Reed in *Episcopal* (p. 233) does not ignore the "then in force" language of Section 4(d).

CONCLUSION

By the foregoing it appears, as the Court below declared, that the Commission has acted properly and in accordance with the powers granted it by the Act. In our submission no special or important reasons appear calling for the Court's review; and the claim of conflict is not only not supported, but shown not to exist.

The decision of the Court below was correct; whereby the Petition for Certiorari should be in all things denied, and it is respectfully so prayed.

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APPENDIX A AND B

APPENDIX A

List of Natural Gas Pipeline Company rate increases involving "locked-in" or "closed-in" periods which have been decided by an Examiner or the Commission, or settled with Commission approval, during the period January 1, 1950 to December 20, 1960.

Pipeline	Docket No.	Date Filed	End of Suspension Period	Approx. Annual Increase	Date Decided or Settled	Decision of Examiner or F.P.C.	Judicial Review
ATLANTIC SEABOARD CORP.							
	G- 1384	4-10-50		$ 400,000	11- 7-51	11 FPC 486, Examiner's Decision	Atlantic Seaboard Corp. v. Federal Power Com. (1952, 4 Cir.) 200 F. 2d 108, rehearing den. 799
					4-25-52	11 FPC 45, Op. 225	
	1806	9- 7-51	3- 7-52	3,000,000	2-26-54		
	2054	8-15-52	2-15-53	4,300,000			
	2452	5-13-54	11- 1-54	5,700,000	1-11-57	17 FPC 15	
	5477	11- 9-54	12-15-54	755,000			
COLORADO INTERSTATE GAS CO.							
	G- 2260	9- 2-53	3- 3-54	9,600,000	12-30-58	20 FPC 874	
	2576	6-30-54	2- 1-55	10,269,000			
	11717	12-17-56	7- 1-57	3,137,000			
EAST TENNESSEE NATURAL GAS CO.							
	G-12264	2-20-57	7-14-57	578,000	12-16-60	Settlement Order of F.P.C.	
	17330	11-28-58	5-15-59	615,000			
	20072	10- 8-59	4- 5-60	895,000			
EL PASO NATURAL GAS CO.							
	G- 1380	3-16-50	10- 1-50	2,500,000	11- 1-51	10 FPC 1484	
	1696	4-30-51	11- 1-51	7,200,000			
	2018	7- 1-52	1- 1-53	15,300,000	11-26-54	Op. 278	
					7-20-56	16 FPC 764 (Settlement order)	
HOME GAS CO.							
	G- 1966	5- 1-52	11- 1-52	1,460,000	7- 2-54	Op. 272	
	2175	4-24-53	10-25-53	287,000	12- 3-54	Op. 272-A	
	12198	2-13-57	7-14-57	673,000	6-22-60	23 FPC 836	
	16819	10- 9-58	4- 9-59	752,000			
	18424	4-10-59	5-15-59	131,000			
	19251	6-24-59	12- 1-59	143,000			
HOPE NATURAL GAS CO.							
	G- 2051	8-15-52	2-15-53	1,900,000	11- 6-53	12 FPC 342 (Op. 262)	
	2165	4- 1-53	10- 2-53	3,200,000			
	2303	10- 9-53	4- 9-54	3,300,000	11-19-54	Examiner's decision	
					1-17-55	14 FPC 510	

Pipeline	Docket No.	Date Filed	End of Suspension Period	Approx. Annual Increase	Date Decided or Settled	Decision of Examiner or F.P.C.	Judicial Review
KENTUCKY GAS TRANSMISSION CORP. (Formerly Central Kentucky Natural Gas)							
	G- 1791	8-17-51	2- 7-52	$2,000,000	3-24-54		
	2056	8-15-52	2-15-53	1,100,000			
	2450	5-14-54	11- 1-54	1,700,000	3-11-57	17 FPC 396	
	5476	11- 4-54	12-15-54	461,000			
	12199	2-13-57	7-14-57	2,300,000	8-11-60	Settlement or order of FPC	
	16816	10- 7-58	4- 7-59	1,721,000			
	18421	4-10-59	5-15-59	878,000			
LAKE SHORE GAS CO.							
	G- 5473	11- 9-54	12-15-54	46,000	3- 7-58	FPC order	
	11983	1-14-57	7-14-54	193,000	6- 2-58	19 FPC 872	
MANUFACTURERS LIGHT & HEAT CO.							
	G- 1967	5- 1-52	11- 1-52	2,169,000	7- 2-54	Op. 272	
	2176	4-24-53	10-25-53	1,343,000	12- 3-54	Op. 272-A	
	12197	2-13-57	7-14-57	1,789,000	2-25-60	23 FPC 446	
	16820	10- 9-58	4- 9-59	1,336,000			
	18425	4-10-59	5-15-59	458,000			
	19250	6-24-59	12- 1-59	605,000			
MICHIGAN WISCONSIN PIPE LINE CO.							
	G- 1678	3-30-51	10- 1-51	3,800,000	7-28-54	Op. 275	
					11-29-54	Op. 275-A	
	1996	6-11-52	12-12-52	3,900,000	3-20-57	18 FPC 412, Examiner's decision	Michigan Wisconsin Pipe Line Co. v. Federal Power Com. (1959, 6 Cir.) 263 F. 2d 553
	8511	1-25-55	4- 1-55	1,526,000	10-15-57	18 FPC 407, Commission's order	
	10524	5-15-56	11-15-56	4,075,000	3-17-58	Examiner's decision	
					12- 1-58	Examiner's supplemental decision	
					3- 6-59	21 FPC 306	
NATURAL GAS PIPELINE CO. OF AMERICA							
	G- 1697	4-17-51	12- 1-51	$ 2,400,000	8-13-53	12 FPC 708, Examiner's decision	
	2083	10- 1-52	4- 1-53	3,500,000	12-14-53	12 FPC 729, Commission's order	
	2302	10-13-53	1- 1-54	7,200,000	1-27-55	14 FPC 212, Examiner's decision	
					4- 1-55	14 FPC 221, Commission's order	
	3123	9- 1-54	3- 2-55	10,702,000	5-24-57	Examiner's decision	
	12157	2- 8-57	8-11-57	5,366,000	6-20-58	19 FPC 1002, Settlement order	
	13950	11-21-57	5-22-58	6,438,000	7-20-59	22 FPC 108	
	16026	7-25-58	12-15-58	4,987,000	12-19-60	Settlement order of FPC	
(Formerly Texas Illinois)	13951	11-21-57	5-22-58	2,723,000	12-19-60	Settlement order of FPC	

Pipeline	Docket No.	Date Filed	End of Suspension Period	Approx. Annual Increase	Date Decided or Settled	Decision of Examiner or F.P.C.	Judicial Review
NEW YORK STATE NATURAL GAS CORP.							
	G- 2119	1-15-53	7-15-53	3,700,000	5-19-54	Settlement order of FPC	
	2315	10-21-53	4-21-54	5,440,000			
NORTHERN NATURAL GAS CO.							
	G- 1382	3-27-50	9-27-50	4,100,000	6-11-52	11 FPC 123 (Op. 228)	State Corp. Com. of Kan. v. Federal Power Com.
					9-26-52	11 FPC 375 (Op. 228-A)	
	1533	10-27-50	4-27-51	5,200,000	11-16-54	Settlement	Northern Natural Gas Co. v. Federal Power Com. (1953, 8 Cir.) 206 F. 2d 690, cert. den., 346 U.S. 922
	1881	12-27-51	6-27-52	10,600,000	7-30-52	11 FPC 278 (C-1 233)	
					11-16-54	Settlement order	
OHIO FUEL GAS CO.							
	G- 1786	8-10-51	2-11-52	1,800,000	7-26-54	Op. 273	
					9-27-54	Order reopening	
	1965	5- 1-52	12- 1-52	2,200,000	12-22-54	Settlement order	
TENNESSEE GAS TRANSMISSION CO.							
	G- 5259	11- 3-54	12-15-54	8,616,000	4-12-57	18 FPC 439, Examiner's decision	
					10-17-57	18 FPC 428, Commission order	
TENNESSEE NATURAL GAS LINES, INC.							
	G- 5472	11- 8-54	7- 1-55	184,000	8- 6-58	20 FPC 132	
	17217	11- 4-58	5-15-59	363,000	6-23-60	23 FPC 848	
	19985	10- 5-59	4- 5-60	866,000			
TEXAS GAS TRANSMISSION CORP.							
	G-10751	6-15-56	1- 1-57	8,161,000	4-22-59	21 FPC 535	
UNITED FUEL GAS CO.							
	G- 1781	8- 6-51	2- 6-52	7,200,000	8- 7-53	12 FPC 251 (Op. 258)	
					11-19-53	12 FPC 351 (Op. 258-A)	
	2055	8-15-52	2-15-53	6,970,000	2- 5-54	Settlement order	
	2451	5-12-54	11- 1-54	13,600,000	10-19-56	16 FPC 1069 (Limited settlement)	
	5475	11- 4-54	12-15-54	2,700,000		Certain issues reserved for furthering hearing	
	12195	2-13-57	7-14-57	10,966,000	9-15-60	Order	
	16316	8-22-58	9-23-58	1,297,000			
	16815	10- 7-58	4- 7-59	6,629,000			
	18420	4-10-59	5-15-59	4,485,000			

APPENDIX B

United Gas Pipe Line Company

Increases in Revenues from Sales of Gas and Tariff Transportation Subject to the Jurisdiction of the Federal Power Commission at Rates in Filings Over Approved Rates Compared with Amount of Increased Gas Cost Included in Filings and with Increased Gas Costs Actually Experienced During Closed Periods April 1, 1956 through June 14, 1961.

	FPC Docket No. G-9547	FPC Docket No. G-10592	FPC Docket No. G-12801	FPC Docket No. G-15360	FPC Docket No. G-18406	Sub-Total (5 Closed Periods)	FPC Docket No. RP 60-2	Total
Closed Period:								
From	4- 1-56	11-16-56	12- 1-57	12- 1-58	10- 1-59	4- 1-56	8-13-60	4- 1-56
To	11-15-56	11-30-57	11-30-58	9-30-59	8-12-60	8-12-60	6-14-61	6-14-61
Duration of Period—Months	$7\frac{1}{2}$	$12\frac{1}{2}$	12	10	$10^{12}/_{31}$	$52^{12}/_{31}$	306 (days)	$62^{11}/_{30}$
Increases in Revenues Subject to the Jurisdiction of the FPC at Rates in Filings over Approved Rates	$6,782,539	17,182,698	21,764,125	24,142,290	32,904,966	102,776,618	41,589,961	144,366,579
Increased Gas Cost Included in Filings:								
Amount	$3,745,777	12,552,036	17,162,059	19,185,662	26,047,674	78,693,208	34,260,054	112,953,262
% of Increases in Revenues	55.23	73.05	78.85	79.47	79.16	76.57	82.38	78.24
Increased Gas Cost Actually Experienced during Closed Period:								
Amount	$6,303,611	13,776,194	21,414,619	22,746,510	32,751,997	96,992,931	35,856,591	132,849,522
% of Increases in Revenues	92.94	80.17	98.39	94.22	99.54	94.37	86.21	92.02

SUPREME COURT, U. S.

DEC 18 1961

JOHN F. DAVIS, CLERK

No. 506

In the Supreme Court of the United States

OCTOBER TERM, 1961

WILLMUT GAS AND OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND UNITED GAS PIPE LINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–9a) is reported at 294 F. 2d 245. The orders of the Federal Power Commission (R. 51–53, 68) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1961. The petition for a writ of certiorari was filed on October 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

An increased rate filed by a natural gas company was suspended for the statutory five-month period by the Federal Power Commission, and hearings were instituted on its lawfulness. After these increased rates had gone into effect upon the expiration of the suspension period but before the hearings were completed, the company filed a further increase in rates. On these facts, the questions presented by the petition are:

1. Whether the Commission is required automatically to reject the second increased-rate filing; and

2. Whether the filing and taking effect of the second increase in rates deprives the Commission of jurisdiction to complete the hearings on the first increase and to order refunds if it finds that the rate was not justified.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in petitioner's Appendix C at pages 15a–20a.

STATEMENT

Petitioner, a distributing company purchasing natural gas from United Gas Pipe Line Company, seeks review of a decision of the Court of Appeals for the District of Columbia Circuit, holding that United was entitled to file increased rates even though the

[1] Should certiorari be granted, we reserve the right also to argue, as we did below, that review was premature because the Commission did not, by ordering a hearing, act on petitioner's motion to reject the filing of those rates. We also reserve the right to argue that petitioner is not a "party" entitled to review of the challenged order under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), because of its failure to seek intervention in the rate proceeding until after denial of its motion for reconsideration of the challenged order, see p. 4, *infra*.

Commission had not concluded hearings with respect to earlier increased-rate filings.

On February 23, 1960, petitioner filed a motion with the Commission to reject increased rates tendered for filing by United on February 11, 1960, or, alternatively, if those rates were permitted to be filed, to disallow United's earlier increased rates as to which hearings had not been concluded (R. 26). These earlier increased rates had been filed by United on September 30, 1955, May 15, 1956,[2] May 29, 1957, May 29, 1958, and March 30, 1959 (Pet. App. 3a). The Commission suspended each of these increased rates (except those for industrial resale only which are not subject to suspension[3]) for the statutory five-

[2] Hearings on the rates filed on September 30, 1955, began on February 6, 1956, and concluded October 31, 1956; hearings on the rates filed May 15, 1956, began July 13, 1956, and ended April 9, 1957. Several weeks after the opening of the first hearing, this Court rendered its decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, holding that a natural gas company could not escape an obligation to provide gas at a specified contract price by unilaterally filing an increased rate pursuant to Section 4 of the Natural Gas Act. Thereupon, a number of United's customers who were interveners in the Commission proceedings (including the present petitioner) filed motions to reject United's filings, relying on the *Mobile* decision. The Commission denied these motions, the court of appeals set aside the Commission's order, but this Court affirmed the Commission's action. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103. The presiding examiner then resumed consideration of the merits of the first two increased rate filings and issued a 141-page initial decision on April 5, 1960, which the Commission adopted, with modification, on January 4, 1961 (Pet. App. 3a).

[3] Section 4(e) expressly states that such rates may not be suspended.

months' period and set them down for hearing to determine their lawfulness (Pet. App. 3a). After the respective suspension periods, the various rates became effective subject to an obligation to refund any portion of the rates found not justified by the Commission.

On March 10, 1960, the Commission ordered a hearing on the rates filed on February 11, 1960, and, except for those relating to industrial resales only, suspended their effectiveness for five months (R. 51–53). The Commission's order, which was the subject of the proceedings below, recited that comments had been received from ten customers and two State Commissions either objecting to the proposed rates, indicating an intention to intervene, or requesting an investigation to ascertain if the increased rates were justified. In a footnote, the Commission stated that petitioner had filed a petition to reject the increased rate filing, but the Commission did not expressly rule on that request (Pet. App. 4a). Petitioner filed a petition for rehearing on April 8, 1960, which was treated as a motion for reconsideration and denied on May 5, 1960 (R. 53–68). Thereafter, on May 6, 1960, petitioner filed a petition to intervene in the Commission proceedings on the increased rates (R. 69–70).

On petition for judicial review of the Commission's March 10, 1960, order, the court below unanimously affirmed,[4] holding, *inter alia,* that Commission juris-

[4] The court noted a number of suggestions (including those referred to in note 1, *supra*) that Willmut's petition should be dismissed for lack of jurisdiction, but chose to resolve them

diction to determine the lawfulness of an increased rate is not lost merely because the natural gas company files another rate increase. The court also held that the Commission had not abused its discretion in permitting the filing of the increased rates tendered by United on February 11, 1960.

ARGUMENT

Petitioner contends that the Commission must reject an increased-rate filing under Section 4 of the Act (Pet. App. 16a) if the rate which it would supersede is then subject to a Section 4 hearing. It rests this contention principally on the ground that otherwise the Commission would be divested of jurisdiction over the superseded rate.[5] As we show below, the view that acceptance of a new rate for filing results in a divestiture of Commission jurisdiction over rates being collected subject to refund is without foundation. Moreover, there is no conflict (Pet. 5–8) between the decision in this case and that in *Amerada Petroleum Corporation* v. *Federal Power Commission*, 293 F. 2d 572 (C.A. 10), petition for certiorari pending, No. 564, this Term. On the issues before it in this case, the lower court's affirmance of the Commission's order was clearly correct, and no further review is warranted.

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in Willmut's favor without passing on them specifically (Pet. App. 4a–5a).

[5] As an alternative remedy to rejection of the last filing, but for the same reasons, it argues that if the superseding rate is accepted for filing the earlier, pending filings must be dismissed and refunds ordered.

1. In support of its position that acceptance of an increased rate for filing divests the Commission of its power to order refunds with respect to a then-effective rate still under investigation, petitioner argues that the rate collected during a locked-in period (*i.e.*, a period terminated by the taking effect of a superseding rate) is a past rate, and thus the Commission can order no refund since it has no reparations authority. See, *e.g.*, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246. But while Congress did not grant the Commission power to award reparations, it did give it the power in Section 4(e) of the Natural Gas Act (Pet. App. 17a–18a) to order refunds with respect to increased rates that become effective after suspension, pending completion of a hearing as to their lawfulness. It is obvious, therefore, that the lack of reparations power does not mean that the Commission has no power to redress the collection of excessive rates received while their lawfulness was being determined, for any refund under Section 4(e) has the effect of retroactively reducing the rate involved. This is true whether the rate collected in the past is still in effect, so that the Commission also orders it reduced prospectively, or whether, as here, the rate has in the interim been changed so that a different rate (whose lawfulness remains to be determined in another later proceeding) is now being collected, leaving only the question of refund of the locked-in rate to be determined in the earlier proceeding. In either event, the refund relates to a rate collected in the past. It is thus clear that pe-

titioner's argument would nullify the entire refund power of Section 4(e).

There is, of course, no inconsistency between the Commission's lack of reparations authority and its possession of a power to order refunds. In choosing not to give the Commission power to award reparations, Congress apparently acted in the belief that such power would encourage wholesale customers to delay complaining about rates until it would no longer be feasible to pass the benefit of reparations payments on to the ultimate consumer. See S. Rep. No. 621, 74th Cong., 1st Sess., 20; Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., p. 1685. The refund provision, on the other hand, which permits the ultimate disallowance of any part of the challenged rate as of the time it took effect, provides an incentive for the immediate raising of any challenge to the new rate, and, coupled with the provision of Section 4(e) placing the burden of justifying the increased rate on the seller, encourages cooperation in bringing about the early disposition of the proceeding. As Mr. Justice Frankfurter points out in his dissenting opinion in the *Montana-Dakota* case, *supra,* consumers were considered adequately protected by the power to grant prospective relief generally and the additional power in increased-rate proceedings to order refunds. 341 U.S. at 258.

The Commission has consistently construed the Section 4(e) refund power as continuing where the

rates under investigation have been superseded and the refund relates to a past period only. In such circumstances its regular practice where it finds the increased rate unlawful has been to order refunds for the locked-in period. See the compilation of 70 such orders in Appendix A to the Brief in Opposition filed in this case by United Gas Pipe Line Company.[6] Such consistent Commission interpretation and practice is entitled to great weight. See, *e.g.*, *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 314-315; *United States* v. *Public Utilities Commission*, 345 U.S. 295, 314–315.[7]

2. Petitioner's further contention (Pet. 21) that, even if the Commission has jurisdiction to determine the lawfulness of the rate in a proceeding involving

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[6] It should be noted that until the late 1940's the number of Section 4 increased-rate proceedings was small. Most of the pipeline rate cases prior to that time were Section 5 proceedings relating to existing rates. Accordingly, the number of successive increased-rate filings which became effective subject to refund was not significant before that time.

[7] It is significant that various courts have reviewed rate orders relating to the locked-in period without any suggestion being made that the Commission lacked jurisdiction to order refunds. See, *e.g.*, *State Corporation Commission* v. *Federal Power Commission*, 206 F. 2d 690 (C.A. 8), certiorari denied, 346 U.S. 922; *Michigan Wisconsin Pipe Line Co.* v. *Federal Power Commission*, 263 F. 2d 553 (C.A. 6); *El Paso Natural Gas Co.* v. *Federal Power Commission*, 281 F. 2d 567 (C.A. 5), certiorari denied *sub nom. California* v. *Federal Power Commission*, 366 U.S. 912; *Wisconsin* v. *Federal Power Commission*, C.A.D.C., Nos. 16175, 16177, 16180, decided November 30, 1961 (slip opinion, pp. 4, 9, 11-12).

a locked-in period only, acceptance for filing of a superseding increase would nullify in advance the order to be issued in the earlier proceeding rests on the same mistaken view that such an order can only fix the rate to be collected in the future.

Moreover, the fact that the superseding rate may be higher than the rate ultimately found reasonable for a past period does not in itself mean that it must be rejected in order to accomplish the protection of consumer interests intended by the Act. If the superseding rate reflects increases in the cost of providing the service (cf. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 113) it is no more than reasonable to permit it to be filed. If, on the other hand, it is predicated even in part on purported cost justifications that are determined to be invalid in the proceeding relating to the past period, the Commission should be, and we believe is, free to give immediate effect to such determinations by an interim partial rate reduction in the new rate proceeding, as soon as that is determined, without awaiting full investigation and hearing on other aspects of the case. *State Corporation Commission* v. *Federal Power Commission,* 206 F. 2d 690, 715–716 (C.A. 8), certiorari denied, 346 U.S. 922; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 236 F. 2d 606 (C.A. 3).[8] See petition for certiorari filed on December 8, 1961, in *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* No. 591, this Term.

[8] Petitioner's reliance (Pet. 17) on these cases to support its view that the Commission may reject filings is misplaced. In both, the Commission's action was based upon a full hearing on the issues decided.

3. The foregoing discussion demonstrates the lack of foundation for the legal premises underlying petitioner's position that the Commission must reject any increased rate that would supersede a rate still subject to a Section 4(e) hearing. Moreover, while the Commission is sympathetic to petitioner's view (Pet. 20) that the preservation of the financial integrity of natural gas companies does not require that such companies be able to file new increased rates every six months, it cannot agree that rejection of any increase in rates so long as the Commission has not concluded its hearing on the existing rates, regardless of the duration of that hearing or the bases for those rates, is an appropriate remedy. The Commission does, however, believe that some remedial legislation with respect to successive increased-rate filings would make rate regulation more effective. Accordingly, in its annual report for fiscal year 1961, which will soon be submitted to the Congress, the Commission is requesting legislation that would authorize it to extend the time of suspension of a proposed change in a currently-effective rate schedule for a period of six months beyond the original five-month period of suspension.

4. No conflict exists between the decision in this case and that of the Tenth Circuit in *Amerada Petroleum Corp.* v. *Federal Power Commission, supra.*[9] Although petitioner recognizes (Pet. 7) that the cases are factually different because the increases involved in the *Amerada* case were filed during the five-month

[9] The opinion in the *Amerada* case is set forth at Pet. App. 10a.

period of suspension of the preceding increased-rate filing, while here the superseding increases were filed after the rates had become effective, it sees a conflict in result. This is because of its view that "neither Court treated suspension *vel non* as material" (Pet. 7). This statement is plainly incorrect. The *Amerada* decision clearly shows (1) that the Commission action was expressly based on its interpretation of the Act as meaning that "during the suspension of a rate, the prior existing rate schedule continues in effect and shall not be changed" (Pet. App. 14a), and (2) that the court's affirmance was based on approval of this long-standing and consistent interpretation, which has been published in the Commission's Rules of Practice and Procedure. See 18 C.F.R. 2.4(f) and 2.52.

Thus, far from ignoring the suspension provision, the *Amerada* decision rests squarely on the conclusion that the Commission may reject rate filings that would alter the status quo intended to be preserved by suspension. While petitioner quotes language (Pet. 7–8) from the *Amerada* case to the effect that the Commission has broad administrative powers under Section 16 of the Act, the sentence following the passage quoted shows that such powers were exercised there only to implement the statutory provisions applicable to rate increases during the period a preceding rate increase was under suspension. Approval of such a use of Section 16 is in no way inconsistent with the court's view here that the Commission need not employ its administrative powers to

prohibit the filing of rate increases while a hearing on a previous increase then in effect is still pending. For the court below was of the opinion that in the present case such an administrative prohibition would be inconsistent with the applicable provisions of the Act as it construed them. In interpreting the Act it considered only the case before it, involving a filing after the end of the suspension of the preceding increase. It had no occasion to consider the special problem of the *Amerada* case—a superseding rate filing during the period of suspension of the preceding rate filing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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